IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976
Misc. No.- 76-5761

Michael Lee Simpson,
Tommy Wayne Simpson — Petitioners

v.

United States [redacted] — Respondent

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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I N D E X

T A B L E O F C A S E S

(Alphabetically)

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Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

The petitioners, Michael Lee Simpson and Tommy Wayne Simpson, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 9, 1976, and October 14, 1976.

A.
Opinions Below

The opinion of the Court and the order denying the petition for rehearing appear in the Appendix hereto.

B.
Statement of Jurisdiction
Date of Judgment Reviewed
Date of Denial of Rehearing
Statutory Provision

The judgment of the Court of Appeals was rendered on October 14, 1976. A timely petition for rehearing was denied on November 9, 1976. This petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked pursuant

to 28 U.S.C. 1254(1).

C.
Question Presented For Review

1. Whether the trial court imposed an illegal sentence in committing the petitioners to prison under separate sentences for violations of both 18 U.S.C. 2113(d) and 18 U.S.C. 924 (c) when both offenses arose from the same set of facts.

D.
Statutory Provisions Involved

1. United States Code, Title 18:

§2113(d)

Whoever, by force or violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

. . . .

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000.00 or imprisoned not more than twenty-five years, or both.

2. United States Code, Title 18:

§924(c)

Whoever - uses a firearm to commit any felony for which he may be prosecuted in a court of the United States,

. . . .

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment of not less than one year nor more than ten years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provisions of law, the court shall not suspend the sentence in the case of the second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the conviction of such felony.

E.
Statement of the Case

The petitioners herein were convicted on February 2 and February 24, 1976 for two separate armed bank robberies. They were also convicted on each occassion of the offense of using a firearm to commit a felony. The Court sentenced each petitioner to twenty-five year terms for each bank robbery and to ten years for each firearm felony, all consecutive to each other. The proof at trial demonstrated that the petitioners flourished handguns during the commission of the bank robberies. The bank robberies were the felonies to which the firearm convictions pertained.

F.
Basis For Original Federal Jurisdiction

The petitioners were brought before the District Court to answer indictments alleging violations of Title 18 of the United States Code.

G.
Argument For Allowance Of Writ

1. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS.

The Sixth Circuit held that the two statutes related to separate offenses involving different elements and therefor were not duplicitous. The Court cited opinions in the cases of United States v. Crew, _____ F2d _____(4th Cir. No. 75-1581) and Perkins v. United States, 526 F2d 688 (5th Cir. 1976).

The Eighth Circuit held in the case of United States of America v. James Theodore Eagle, _____ F2d _____. (8th Cir. 75-1926) that a conviction under §924(c) of Title 18 could not stand where the felony referred to therein was a §1153 violation of Title 18 arising from the same facts.

Unlike the Sixth, Fourth, and Fifth Circuit, the Eighth Circuit held that Congress did not intend for the Gun Control Act to govern wherein the statute underlying the felony itself provided for increased punishment for the use of a dangerous weapon. The cases decided by the Sixth, Fourth and Fifth Circuits addressed aggravated bank robberies. These are felonies for which increased punishment is provided for the use of a dangerous weapon.

These cases present a disparity in the application of federal law affecting the substantive rights of federal offenders. The offenders are subject to undefined statutory or constitutional interpretation of these federal laws.

H.
Parties

The parties in the Court below consisted of each of the petitioners and the United States of America. Tommy Wayne Simpson was represented by the Federal Public Defender's Office in each bank robbery. Due to a potential conflict Michael Lee Simpson was represented in one of the bank robberies by the Honorable Robert W. Willmott, Jr., and was represented in the remaining bank robbery by the Federal Public Defender's Office.

I.
Opinions

The opinions of the Sixth Circuit Court of Appeals, the Fourth Circuit and the Eighth Circuit are attached hereto.

Respectfully submitted,

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Federal Public Defender's Office

Nos. 76-1459, -1460, -1465, -1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

OCT 14 1976

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA, :
Plaintiff-Appellee :
vs Nos. 76-1459 & -1466 :
MICHAEL LEE SIMPSON, :
Defendant-Appellant :

ORDER

UNITED STATES OF AMERICA, :
Plaintiff-Appellee :
vs Nos. 76-1460 & -1465 :
TOMMY WAYNE SIMPSON, :
Defendant--Appellant :

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration of the record, the briefs and oral arguments of counsel we are of the opinion that the defendants were properly charged with the armed robbery of two banks, on different occasions, and were convicted by juries in two trials, and they received consecutive sentences for violations of 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c).

The two statutes, in our opinion, relate to separate offenses involving different elements, and they are not duplicitous. United States v. Crew, ___ F.2d ___ (4th Cir. No.75-1581, 1976). Perkins v. United States, 526 F.2d 688 (5th Cir. 1976). The District Court was not required to impose concurrent sentences

for the two separate bank robberies nor under the two statutes.

Finding no prejudicial error either in the convictions or in the sentences, it is ORDERED that the judgments of conviction be and they are hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Nos. 76-1459, -1460, -1465, -1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee	:	
vs Nos. 76-1459 & -1466	:	
MICHAEL LEE SIMPSON,	:	
Defendant-Appellant	:	ORDER
UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee	:	
vs Nos. 76-1460 & -1465	:	
TOMMY WAYNE SIMPSON,	:	
Defendant-Appellant	:	

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration it is ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

File

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1580

United States of America, Appellee.

versus

Zacherie Leroy Crew, Appellant.

No. 75-1581

United States of America, Appellee.

versus

Dewayne Jones, Appellant.

No. 75-1582

United States of America, Appellee.

versus

Leonard Carter, Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued February 5, 1976 Decided APR 8 1976

Before CRAVEN and WIDENER, Circuit Judges, and JONES, Chief District Judge.*

Robert L. Dolbeare [court-appointed counsel] (Obenshain, Hinnant, Dolbeare & Beale on brief) for Appellant in 75-1580; F. Bryon Parker, Jr., [court-appointed counsel] for Appellant in 75-1581; J. Thomas McGrath [court-appointed counsel] (Nance, Simmons, Guill, McGrath & Catlett on brief) for Appellant in 75-1582; Rodney Sager, Assistant United States Attorney, (William B. Cummings, United States Attorney, on brief) for Appellees in 75-1580, 75-1581 and 75-1582.

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* Sitting by designation.

JONES, Chief District Judge:

In the bill of indictment, Zacherie Leroy Crew, Dewayne Jones, and Leonard Carter were charged in Count I with the robbery of the Meadowood Branch of the Central National Bank in Henrico County, Virginia, on September 26, 1974 in violation of 18 U.S.C. 2113(a) and (d), in Count II with willfully and unlawfully carrying a firearm during the commission of the robbery in violation of 18 U.S.C. 924(c)(2), and in Count III with willfully using a firearm in the commission of the robbery in violation of 18 U.S.C. 924(c)(1). All three defendants were charged as principals, and as accessories under 18 U.S.C. 2, and were tried together. The jury returned a verdict of guilty against all defendants on each Count and the trial court imposed identical sentences on Crew and Jones of thirteen years on Count I, one year on Count II, and one year on Count III. Carter received fifteen years on Count I and one year each on Counts II and III. All sentences were pronounced under the provisions of 18 U.S.C. 4208(a)(2) and were to run consecutively.

Although numerous questions are raised in this appeal, we find only those relating to sentencing meritorious. Therefore, it is our conclusion that no substantive defect in trial

is to be found in any of these cases, and the convictions should be affirmed. We now proceed to the consideration of whether there is any infirmity in the sentences imposed.

First, appellants Jones and Carter contend that Counts II and III, charging the unlawful carrying and use of a gun in the commission of a felony under Section 924(c), should be dismissed upon the ground that these offenses merged into the armed bank robbery offense contained in Section 2113(d). They concede that Section 924(c) sets forth a separate crime when the related offense makes no statutory provision for the use of a firearm. United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972); United States v. Vigil, 458 F.2d 385 (10th Cir. 1972); United States v. Ramirez, 482 F.2d 807 (2nd Cir. 1973). However, it is their contention that the armed robbery provisions of Section 2113(d) preclude conviction and sentencing under both Sections 2113(d) and 924(c). They argue that to hold otherwise would violate their constitutional right under the Fifth Amendment to be free from dual punishment for a single offense.

After a careful examination of the statutes and cited authority, we find that Section 924(c) does establish a separate offense from that of armed bank robbery, and hold that a separate sentence under each section was proper.

It is well established that a defendant may be convicted of two separate offenses arising from a single act so long as each requires proof of a fact not essential to the other. Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954); Montgomery v. United States, 146 F.2d 142 (4th Cir. 1944). Expressed another way, it must be shown that the two offenses charged are in law and in fact the same offense before a double jeopardy claim is viable. Hattaway v. United States, 399 F.2d 431 (5th Cir. 1968); Dryden v. United States, 403 F.2d 1008 (5th Cir. 1968). When Section 2113(d) is compared with Section 924(c), it becomes apparent that different elements of proof are required. United States v. Canty, 469 F.2d 114, 129 (U.S. App. D.C. 1972).

In order to sustain a conviction under Section 2113(d) the government must establish that the perpetrator assaulted a person, or jeopardized the life of a person, by using a dangerous weapon or device during the commission of the robbery. In comparison, in order to sustain a conviction under Section 924(c) the government must establish that the perpetrator used or carried a firearm during the commission of a felony. The appellants would have us equate "using a dangerous weapon or device" with "used or carried a firearm" and find that the

prohibition against double jeopardy has been violated. However, it is clear that Congress never intended to equate these terms.

The passage of Section 924(c) was a Congressional reaction to demands for "gun control" in the wake of political assassinations. It is a narrowly drawn statute intending to discourage a felon from using or carrying a firearm, and does not encompass the use of nonexplosive weapons. On the other hand, Section 2113(d) punishes a felon for the use of any weapon or device during the course of a bank robbery which jeopardizes the lives of others. Therefore, the offenses are not identical in law and fact, and the separate sentences under Sections 2113(d) and 924(c) are affirmed. However, the challenge of appellant Crew to the bifurcated sentence under Section 924(c)(1) and (2) presents a more troublesome question.

Appellant Crew contends that it was error for the trial court to impose separate sentences under Counts II and III which respectively charge the unlawful carrying of a firearm in the commission of a felony in violation of Section 924(c)(2), and the unlawful use of a firearm in the commission of a felony in violation of Section 924(c)(1). The appellant argues that Section 924(c) was intended to charge only a single crime, and therefore the trial court's "pyramiding" of sentences was improper. On the facts of this case, we agree.

From a studied examination of the statutory language and the legislative history of the statute, there is nothing to indicate that the Congress intended to make the carrying of a firearm in the commission of a felony a separate crime from the use of a firearm in the commission of a felony when the carrying is shown to be a part and parcel of its use. Rather, it appears that Congress intended to punish for this lesser act, if the culprit should only carry the firearm during the course of the felony and not use it. See Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957); Phillips v. United States, 518 F.2d 108 (4th Cir. 1975); United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975); United States v. Curry, 512 F.2d 1299 (4th Cir. 1975).

In the case at bar the evidence adduced at trial of the gun's use was exclusively relied upon to show the related crime of "carrying". In such a situation, where a single act is the proof of two offenses set forth in the same subsection, it is our opinion that Congress did not intend for separate sentences to lie. Cf. Prince v. United States, supra; Phillips v. United States, supra. See also United States v. Atkinson, supra; United States v. Curry, supra. Therefore, upon the facts of of this case we conclude that the offense of "carrying" the firearm merged into the offense of "using" the firearm, and that separate sentences under Counts II and III were improper. Upon

this basis we remand to the district court for the sole purpose of vacating the sentence under Count II imposed upon each defendant.

Affirmed in part; reversed in part and remanded.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 75-1926

United States of America, Appellee, v. James Theodore Eagle, Appellant.	* * * * * * * * *	Appeal from the United States District Court for the District of South Dakota.

Submitted: May 11, 1976

Filed: July 30, 1976

Before VOGEL, Senior Circuit Judge, and HEANEY and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

James Theodore Eagle, an Indian, appellant here and defendant below, was convicted in the United States District Court for the District of South Dakota of an assault with a dangerous weapon upon the person of James Catches, another Indian, with the assault taking place on the Pine Ridge Indian Reservation, in violation of 18 U.S.C. § 1153, as amended, and of having used a firearm in the commission of the offense in violation of 18 U.S.C. § 924(c)(1). The district court sentenced the defendant to imprisonment for three years on each of the two counts of the indictment with the sentences to be served consecutively. The defendant appeals.

We affirm the conviction and sentence on Count I, the

§ 1153 count. As to Count II, the § 924(c)(1) count, we reverse and remand the case with directions that Count II be dismissed.

I.

The government's evidence at trial showed that, on the afternoon of May 17, 1975, James Catches was riding from Oglala, South Dakota to Pine Ridge, South Dakota in a car driven by Dale Janis. There were three other men in the car: Lloyd Bissonette, Maurice Waters and Ezzard Tobacco. All had been drinking to some degree on that day. The men had traveled about a mile from Oglala when they stopped, near a historical marker, to add oil to their car's engine. The spot where they stopped was on the Reservation.

All the men were in the car, and they were about to leave the marker when a green car came weaving down the road toward them. This car stopped in the middle of the highway. Two men with rifles emerged. One of these men was identified by three of the occupants of the first car - Janis, Walters and Bissonette - as the defendant, James Eagle. Janis attempted to drive his car around the green car. As he was doing so, he heard three shots. One of the shots struck the arm of James Catches above the wrist, causing a severe wound.

The defendant presented an alibi defense. Nonetheless, the jury found him guilty on both counts. As stated, consecutive three year sentences were imposed.

Appellant subsequently moved for a new trial on the basis of newly discovered evidence. Among the grounds presented was an allegation that one of the jurors, Keith Long, had admitted that he realized during the trial that Eagle was one of the men charged with the shooting of two FBI agents at

Oglala, in an unrelated incident. Appellant's counsel filed an affidavit, in which he asserted that he learned this from Charles Dorothy, another attorney, who claimed to have spoken to juror Long.

A hearing was held on the new trial motion. Appellant moved to subpoena the jurors, but the motion was denied. Charles Dorothy did testify; he stated that Long told him that he did realize during the trial that Eagle was connected with the FBI shootings. Dorothy said that Long did not communicate this belief to the judge or to any court official.

The government submitted the affidavit of juror Long. Long admitted that during the trial he had speculated that Eagle might be one of the men charged in the FBI deaths.[1] However, he asserted that this specualtion was not discussed with any other juror, and did not affect his own decision in the case.

On this evidence, the district court denied the motion for new trial. A timely appeal was taken from both the conviction and the denial of the new trial motion.

Appellant presents these arguments for reversal: that the trial court erred in denying his motion to subpoena the jurors; that the court did not have jurisdiction of the § 924(c)(1) charge; that the evidence was not sufficient to support the verdict; and that the imposition of consecutive sentences was improper.

II.

A defendant who seeks to overturn a verdict by proof of

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[1] On voir dire, the jurors had been asked if they had ever heard of appellant. Long replied in the negative.

jury misconduct must overcome two obstacles. First, he must produce evidence which is not barred by the rule of juror incompetency. Secondly, his evidence must be sufficient to prove "grounds recognized as adequate to overturn the verdict." See Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), cert. denied, ___ U.S. ___, 96 S.Ct. 1119 (1976).

Appellant here has not shown an ability to pass the first obstacle. The evidence which he proposes to produce by summoning the jurors to testify would not be competent to impeach the verdict. Accordingly, we conclude that the district court acted correctly in denying the motion to subpoena the jurors, and in denying the new trial motion.

Rule 606 (b) of the Federal Rules of Evidence is a codification of the common law rule relating to juror testimony.

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. . . .

See generally Government of Virgin Islands v. Gereau, supra, 523 F.2d at 149; Downey v. Peyton, 451 F.2d 236, 239 (4th Cir. 1971); United States ex rel. Owen v. McMann, 435 F.2d 813, 819 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971). The general rule both at common law and under the Rules of

Evidence is one of incompetency, with an exception made for testimony relating to extraneous information or improper influence in the jury room.

Appellant contends that Long, if subpoenaed, would testify that he realized during the trial that Eagle was connected with the FBI shootings. He contends that this realization constituted an "extraneous influence," and that Long's testimony is therefore competent under the exception to the general rule. He argues that he should be allowed to subpoena not only Long but also the remaining jurors to determine whether they entertained similar speculations.

Appellant's argument ignores a crucial fact: no contention has been made that juror Long voiced his suspicions about appellant's identity in the jury room. In fact, by affidavit Long denies mentioning his speculation. This is fatal to appellant's position.

A central purpose of the rule of juror incompetency is the prevention of fraud by individual jurors who could remain silent during deliberations and later assert that they were influenced by improper considerations. See Mattox v. United States, 146 U.S. 140, 148 (1892). If there were no rule of incompetency, the "secret thought of one" juror would have "the power to disturb the expressed conclusions of twelve." Id., 146 U.S. at 148. For this reason, courts have insisted in cases of this sort that proof be limited to "overt acts which are susceptible to the knowledge of other jurors." Gafford v. Warden, 434 F.2d 318, 320 (10th Cir. 1970); see United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975).

Appellant's allegations do not go beyond the mental process of juror Long. Appellant has alleged no overt acts suscepti-

ble to the other jurors' knowledge. He has thus not shown that competent evidence could be produced by summoning Long to testify, and so may not subpoena him.

Similarly, appellant has no right to subpoena the remaining jurors. He has made no specific allegations that any of them engaged in overt improper acts susceptible of proof. He clearly has no general right to subpoena the jurors in the absence of such allegations. United States v. Dye, 508 F.2d 1226, 1232 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975); Smith v. Cupp, 457 F.2d 1098, 1100 (9th Cir.), cert. denied, 409 U.S. 880 (1972); Dickinson v. United States, 421 F.2d 630 (5th Cir. 1970).

It is clear that, in the absence of specific allegations of ability to adduce competent evidence, the district court properly denied both the motion to subpoena jurors and the motion for a new trial.

III.

Count II of the indictment is based on 18 U.S.C. § 924(c), which provides: "Whoever (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States. . .shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years." This statute creates an offense separate from the underlying felony. United States v. Howard, 504 F.2d 1281, 1286 (8th Cir. 1974); United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972). Its purpose is to prevent the carrying and use of firearms in the commission of federal felonies. See United States v. Howard, supra, 504 F.2d at 1286.

Appellant contends that although the statutory language

is broad ("any felony"), Congress did not in fact intend that a prosecution for violating § 924(c)(1) would be available where the underlying felony is that charged here, an assault with a dangerous weapon in violation of 18 U.S.C. § 1153, the Major Crimes Act. We agree, and so vacate the Count II conviction.

A.

We reach this result first because § 1153 itself provides an increased penalty for use of a dangerous weapon. We are convinced that Congress did not intend § 924(c)(1) to be applicable in a case involving such a statute.[2]

We are led to this conclusion by the legislative history of § 924(c)(1). This section originated as a House floor amendment to a bill to amend the Gun Control Act of 1968;[3] the only legislative history consists of the floor debates prior to the bill's passage. The debates evidence a congressional concern with the rising incidence of the use of firearms in the commission of crimes, and an intention to deter such use by imposing higher penalties on federal criminals who use firearms.[4] See United States v. Melville, 309 F.Supp. 774 (S.D. N.Y. 1970).

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[2]Our conclusion is based solely on statutory grounds. We need not reach the question whether Congress could, consistent with the double jeopardy clause, punish as separate crimes (1) an assault with a dangerous weapon and (2) the use of a firearm in committing the assault.

[3]H.R. 17735, 90th Cong., 2d Sess. (1968), enacted as Pub. L. 90-618, Title I, § 102, 82 Stat. 1223.

[4]See 114 Cong. Rec. 21765 passim (1968).

The amendment's sponsor, Representative Poff, apparently recognized that certain federal crimes already entailed increased penalties if committed with firearms. He expressed his intention that the new statute would not be applicable to these crimes. He said:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officials, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other firearm felonies.

114 Cong. Rec. 22232 (1968) (remarks by Representative Poff).[5]

The sections of Title 18 enumerated by Representative Poff (except Chapter 44) have this in common: all impose a higher penalty for the felony specified if it is committed with a "dangerous" or "deadly" weapon. Representative Poff's remarks evidence a clear congressional intention that the new statute not be applicable in cases involving statutes of this type. This intention accords with the deterrence rationale of § 924(c)(1). It is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive statute itself does so.

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[5]It is proper to consult this legislative history to determine whether Congress meant the phrase "any felony" to have a literal meaning, even though the statute is arguably unambiguous. "[W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Train v. Colorado Public Interest Research Group, 44 U.S.L.W. 4717, 4719 (U.S. June 1, 1976); United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) (footnotes omitted).

The crime charged in Count I, an assault between Indians in Indian country, is clearly a crime of the same type as those enumerated by Representative Poff. If committed with a dangerous weapon, it is a federal offense. If committed without a dangerous weapon, it is a minor offense within tribal jurisdiction. See 18 U.S.C. § 1152. The existing statutes, by providing federal sanctions only if firearms are used, perform the function of deterrence. Application of § 924(c)(1) to the crime is not necessary, and apparently was not intended by Congress.[6]

We thus conclude that a crime of the type charged in Count I, i.e., one for which the penalty is enhanced by use of a dangerous weapon, cannot form the basis of a prosecution under § 924(c)(1).

B.

We are convinced that § 924(c)(1) is inapplicable here

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[6]For a contrary result, it could be argued that Representative Poff did not specifically mention the § 1153 assault with a deadly weapon in his floor remarks, and that he therefore did not intend to exclude it from the operation of § 924(c)(1). However, we can perceive no apparent rational purpose for singling out the § 1153 offense, among dangerous weapon offenses, to be the basis of a § 924(c)(1) charge. Moreover, to do so would create serious constitutional problems. Representative Poff explicitly excluded from the increased penalty 18 U.S.C. § 113, which would be applicable to the assault charged here if it had been committed by a non-Indian on an Indian. Singling out the Indian defendant for harsher treatment may well run afoul of the equal protection aspects of the fifth amendment due process clause. See United States v. Cleveland, 503 F.2d 1067, 1070 (9th Cir. 1974); United States v. Goings, 527 F.2d 183 (8th Cir. 1975); United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975). The desirability of avoiding the equal protection questions which would be created is a factor leading us to the construction adopted in the text. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

for a second reason: federal jurisdiction of Count I arises by reason of the Major Crimes Act, 18 U.S.C. § 1153. It is our conclusion that Congress did not intend for a § 924(c)(1) prosecution to be available where the underlying felony is based on § 1153.

This conclusion is reached, again, after an examination of the legislative history and the purposes behind the two statutes.

We have already referred to the history of § 924(c)(1). As indicated, it is a relatively new statute, passed after only floor debate. Its purpose is to deal in a broad stroke with a specific evil - the use of firearms by federal felons.

Section 1153, in contrast, is a very old statute.[7] Together with 18 U.S.C. § 1152, it represents an attempt to balance the sometimes conflicting interests of the federal government, the Indian tribes, and the states in the regulation of criminal conduct in Indian country. See generally Keeble v. United States, 412 U.S. 205, 209-12 (1973). By the terms of § 1152, the general laws of the United States relating to government territory were extended to Indian country, except in certain cases, including those involving offenses between Indians. By terms of § 1153, certain major crimes between Indians were brought within federal jurisdiction. Among these crimes is the assault with a dangerous weapon which is the subject of Count I of the instant indictment.

From time to time these statutes have been amended to

[7]Certain provisions of the current statute date from 1885. Act of March 3, 1885, c. 341, § 9, 23 Stat. 362, 385.

adjust the balance among the competing sovereignties. Particularly, § 1153 has been amended to provide that certain crimes, including the assault with a deadly weapon charged here, be "defined and punished in accordance with the laws of the State in which such offense was committed."[8] These amendments represent an evident congressional purpose to conform the punishment of these crimes to that provided by state law.

To allow a § 924(c)(1) prosecution to be based on a § 1153 violation would conflict with this purpose. It would in effect impose a new federal penalty for conduct which Congress has determined will be punished in accordance with state law.[9]

We are thus faced with a conflict between two statutes: a general criminal statute, and a statute dealing with the specific problem of criminal conduct in Indian country. The rules of construction are clear as to which must prevail.

> Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

[8]Act of Nov. 2, 1966, Pub. L. 89-707, § 1, 80 Stat. 1100.

[9]We are aware that because § 924(c)(1) creates a new offense, the penalty for its violation is technically not a penalty imposed for the § 1153 crime. It can be argued that the two statutes are therefore not in conflict and that § 1153 itself is still punished solely in accord with state law. In ascertaining congressional intent, however, we look to the substance, rather than the form, of the statutes. Application of § 924(c)(1) here would clearly thwart the objective of amended § 1153: leaving the fixing of punishment for this conduct to the states.

2A Sutherland, STATUTORY CONSTRUCTION, ¶ 51.05 (4th ed. 1975).

There is no indication that Congress, in enacting § 924 (c)(1), intended to disturb the statutory scheme relating to Indian offenses. Therefore, § 1153, the specific statute dealing with the punishment of such offenses, must prevail as the controlling statement of national policy in this area. That section provides that the crime charged here must be punished in accordance with state law. The inapplicability of § 924(c)(1), which creates a federal penalty, is clear.[10]

For these reasons, as well as for the reasons stated in IIIA above, we conclude that, under the proper construction of § 924(c)(1), "any felony" does not include the crime charged in Count I of this indictment: assault with a dangerous weapon in violation of § 1153. This being so, Count II of the indictment fails to charge an offense against the United States, and the conviction entered on that count must be vacated.

IV.

Appellant contends that the evidence was insufficient to prove beyond reasonable doubt that he was the man who shot and wounded Catches. Of course, in determining the sufficiency of the evidence we view the evidence in the light most favorable to the government, giving the government the benefit of all reasonable inferences favorable to its case which may be

[10]The authorities relied upon by the government for the proposition that the general criminal laws of the United States apply in Indian country (see, e.g., Stone v. United States, 506 F.2d 561 (8th Cir. 1974); Walks on Top v. United States, 372 F.2d 422 (9th Cir. 1967) are inapposite. Those cases did not present the problem, present here, of conflict between a general criminal statute and the statutory scheme governing Indian country offenses.

drawn therefrom. See United States v. Wisdom, ___ F.2d ___ (8th Cir. No. 75-1756, April 28, 1976); United States v. Diggs, 527 F.2d 509, 512 (8th Cir. 1975).

Here, three government witnesses placed appellant at the scene of the crime, with a gun in his hand, immediately before the firing of the shots. Appellant, by alibi testimony, attempted to place himself elsewhere. The jury chose to believe the government's witnesses; this court cannot say that it erred in so doing.[11] The sufficiency of the evidence to support the guilty verdict is apparent.

V.

Appellant finally contends that the trial court improperly imposed consecutive three year sentences on the two counts. He argues that, because appellant was young and had no prior convictions, the district court erred in imposing such harsh sentences.

Our disposition of Count II moots any claim based on the second three year sentence. The remaining sentence was within the statutory limits for this serious offense. A proper "no benefit" finding under the Federal Youth Corrections Act was made. Appellant's attack on the sentence is therefore without basis. Dorszynski v. United States, 418 U.S. 424, 431 (1974); United States v. Crow Dog, ___ F.2d ___ (8th Cir. No. 75-1934, June 17, 1976).

For the reasons stated above, the conviction on Count II cannot stand. However, no basis for reversal on Count I has been shown.

[11]That the government's witnesses admitting to drinking on the day of the offense is not conclusive, but is merely a factor going to the credibility of their testimony.

The conviction and sentence on Count I are affirmed; the conviction and sentence on Count II are reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5761

MICHAEL LEE SIMPSON AND TOMMY WAYNE SIMPSON,
Petitioners,

—v.—

UNITED STATES OF AMERICA

No. 76-5796

MICHAEL LEE SIMPSON,
Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONS FOR CERTIORARI FILED NOVEMBER 26, AND DECEMBER 3, 1976
CERTIORARI GRANTED APRIL 18, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5761

MICHAEL LEE SIMPSON AND TOMMY WAYNE SIMPSON,
Petitioners,

—v.—

UNITED STATES OF AMERICA

No. 76-5796

MICHAEL LEE SIMPSON,
Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

DATE	PROCEEDINGS
11-11-75	Indictment Number 75-86
11-11-75	Indictment Number 75-87
2- 2-76	Judgment/Commitment Order Number 75-87
2-24-76	Judgment/Commitment Order Number 75-86

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DATE	PROCEEDINGS
10-14-76	Order of the Court of Appeals affirming District Court
11- 9-76	Order of the Court of Appeals denying petition for rehearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

No. 75-87

UNITED STATES OF AMERICA

vs.

TOMMY WAYNE SIMPSON, MICHAEL LEE SIMPSON,
TIP EARLS, JR.

COUNT 1.

(T. 18, Sec. 2113(a) (d), 3, U.S.C.)

THE GRAND JURY CHARGES:

That on or about the 4th day of November, 1975, at Middlesboro, Bell County, in the Eastern District of Kentucky,

TOMMY WAYNE SIMPSON

and

MICHAEL LEE SIMPSON

aided and abetted by

TIP EARLS, JR.

did, by force, violence and intimidation, take from the persons and presence of Dorothy Sulfridge, Gail Brooks, Joann Bailey and Imogene Graves, employees of the Commercial Bank, Middlesboro, Kentucky, the sum of $40,-081.00, more or less, of money belonging to and in the custody, control, management and possession of the West End Branch of the Commercial Bank, Middlesboro, Kentucky, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing said offense, the said Tommy Wayne Simpson and Michael Lee Simpson did assault and put in jeopardy the lives of the aforesaid employees of said bank by the use of dangerous weapons, to wit, handguns.

COUNT 2.

(T. 18, Sec. 924(c), U.S.C.)

THE GRAND JURY FURTHER CHARGES:

That on or about the 4th day of November, 1975, at Middlesboro, Bell County, in the Eastern District of Kentucky,

TOMMY WAYNE SIMPSON

and

MICHAEL LEE SIMPSON

used firearms, to wit, handguns, to commit a felony for which they may be prosecuted in a court of the United States, that is, they used the firearms in committing the felony as outlined in Count 1 of this indictment, which is adopted by reference the same as if written in full herein.

A TRUE BILL

_____
FOREMAN

EUGENE E. SILER, JR.
United States Attorney

By: _____
E. LEE WOODS
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

No. 75-86

UNITED STATES OF AMERICA

vs.

TOMMY WAYNE SIMPSON, MICHAEL LEE SIMPSON

COUNT 1.

(T. 18, Sec. 2113(a) (d), U.S.C.)

THE GRAND JURY CHARGES:

That on or about the 8th day of September, 1975, at Middlesboro, Bell County, in the Eastern District of Kentucky,

TOMMY WAYNE SIMPSON

and

MICHAEL LEE SIMPSON

did, by force, violence and intimidation, take from the persons and presence of Joyce Day and Joy Bolinger, employees of the Commercial Bank, Middlesboro, Kentucky, the sum of $41,898.49, more or less, of money belonging to and in the care, custody, control, management and possession of the East End Branch of the Commercial Bank of Middlesboro, Kentucky, the deposits of which were then insured by the Federal Deposit Insurance Corporation and, in committing the offense, the said Tommy Wayne Simpson and Michael Lee Simpson did assault and put in jeopardy the lives of the aforesaid employees of said bank by the use of dangerous weapons, to wit, handguns.

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TOMMY WAYNE SIMPSON

and

MICHAEL LEE SIMPSON

used firearms, to wit, handguns, to commit a felony for which they may be prosecuted in a court of the United States, that is, they used the firearms in committing the felony as outlined in Count 1 of this indictment, which is adopted by reference the same as if written in full herein.

A TRUE BILL

_____

FOREMAN

EUGENE E. SILER, JR.
United States Attorney

By: _____

E. LEE WOODS
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

London Criminal No. 75-87

UNITED STATES OF AMERICA, PLAINTIFF

vs.

TOMMY WAYNE SIMPSON, MICHAEL LEE SIMPSON AND TIP EARLS, JR., DEFENDANTS

TRANSCRIPT OF SENTENCING PROCEEDING—
February 2, 1976

SENTENCING OF TOMMY WAYNE SIMPSON
AND MICHAEL LEE SIMPSON

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[1] The within typescript contains the sentencing of the defendants Tommy Wayne Simpson and Michael Lee Simpson at the conclusion of the trial of the above styled case which was tried in the United States District Court for the Eastern District of Kentucky sitting at Lexington before the Honorable Bernard T. Moynahan, Jr., Chief Judge, on February 2, 1976, at 11:50 A.M. The defendant Tip Earls, Jr., was found not guilty by the jury and proceedings were had to cover the sentencing of the other two defendants who had been found guilty by the jury. The defendant Tip Earls, Jr., was represented by Mr. William Harrell, Attorney, Tazewell, Tennessee. [2] The defendant Tommy Wayne Simpson was represented by Mr. Shelby Kinkead, Jr., Federal Public Defender's Office, and the defendant Michael Lee Simpson was represented by J. David Porter, Attorney, Public Defender. Proceedings were had as follows:

BY THE COURT: Let the defendant Tip Earls, Jr., be discharged insofar as the indictment is concerned in

London Criminal No. 75-87, the case on trial. Now, Mr. Earls, there is a case pending against you here, No. 75-91. Mr. Porter and Mr. Harrell, are you representing him, each of you?

BY MR. PORTER AND MR. HARRELL: Yes, Your Honor.

BY THE COURT: No bond was fixed in that case inasmuch as he was held on the other charge. What says the United States as to the amount of bond in No. 75-91?

BY MR. ELDON WEBB, for the United States: United States would move for bond, with good and sufficient surety, Your Honor, in the amount of $25,000.

BY THE COURT: What say the defendants?

BY MR. HARRELL: If the Court please, it would be impossible for this defendant to make that bond.

[3] BY THE COURT: Well, he made a sufficient bond in this case.

BY MR. HARRELL: His attorney did, Your Honor.

BY THE COURT: All right. Let the bond be fixed at the amount of $10,000. If he can't make it you can file a motion for reduction and I will consider it at that time. Let him be held until that bond be executed or pending some further order of the Court. All right. Let the defendants, Tommy Wayne Simpson and Michael Lee Simpson, come around. Mr. Tommy Wayne Simpson, you were indicted here, and Mr. Michael Lee Simpson, in an two count indictment, Count 1 charging each of you with the offense of bank robbery, Count 2 charging each of you with the offense of using firearms in connection with the commission of same. You appeared with your attorneys, entered a plea of not guilty to the charges contained in that indictment, you being jointly indicted in Count 1 with the defendant Tip Earls, Jr., the jury was empaneled to hear your case. The jury having heard the evidence in the case, arguments of counsel and instructions of the Court retired to consider the case, subsequently returned into court finding you, Mr. Tommy Wayne Simpson guilty on Count 1 and Count 2 of the indictment and you, Mr. Michael Lee Simpson, guilty on both Count 1 and Count 2 of [4] the indict-

ment and you, Mr. Tip Earls, Jr., not guilty on the charge contained in Count 1. He has been discharged insofar as that case is concerned but I want to ask each of you now, Mr. Tommy Wayne Simpson and Mr. Michael Lee Simpson if there is anything you or your attorney wish to say to the Court before the Court pronounces sentence.

BY MR. KINKEAD: Your Honor, I would request that I might be allowed to see the pre-sentence report.

BY THE COURT: Yes, sir. And I can be looking at it at the same time. It has just been handed to me. . . . Anything you wish to say, Mr. Kinkead?

BY MR. KINKEAD: Yes, Your Honor. We would request the Court that if it imposes sentence on Count 2 of the indictment that it run that sentence concurrent with any sentence that is imposed on Count 1. The basis of that request is that I think the case law is clear—if an individual is indicted under Section A and Section D of the bank robbery statute, then those two sections merge for sentencing purposes and the Court cannot impose consecutive sentences. Section D—or paragraph D of the bank robbery statute is the gun section, the section which has aggravated penalty. I think in indicting these defendants under 924, the United States is charging the same thing as if [5] they indicted him under Paragraph D as well. Inasmuch as a D sentence would merge I think a 924 sentence should also merge. So I will ask the Court to impose—if it imposes sentence under Count 2 to run it concurrently with any sentence imposed under Count 1.

BY THE COURT: All right. Anything else? Anything, Mr. Porter?

BY MR. PORTER: No, Your Honor.

BY THE COURT: All right. The 10th Circuit, Mr. Kinkead, in United States vs. Vigil, 458 Federal 2d 385, is the only authority that I have been able to find on that proposition. And in that case if gives the 10th Circuit rule that the 18 U. S. Code Section 924C did not aggravate the punishment, for other offenses but really created a new felony and of course if that is the case, bank robbery could be committed by placing a person

in fear by force, violence and intimidation. Under D without specifically saying—saying a dangerous weapon, not specifically a hand gun, when it was first presented to me in an earlier case I came to the conclusion that the offenses might merge but I studied it at that time and after having read the cases, the only case law on the subject, I came to the conclusion that they did not.

[6] BY MR. KINKEAD: Well, I don't want to belabor it, Your Honor, but I think the elements are a separate distinction as to whether the handgun, which is a rather tenuous distinction—

BY THE COURT: Well, it's given me some concern.

BY MR. KINKEAD: I think there is some law that makes the D section merge but the way I understood it the 924 charge accomplishes the same thing as the D section and if the D would merge, I think the 924 would also merge.

BY THE COURT: What says the United States about this?

BY MR. WEBB: If the Court please, I believe that is covered by the language of 924C in which it says "shall be in addition to the punishment provided for the commission of such felony" and it is the position—the last part of that section says, "Nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment involved for the commission of such felony.

BY THE COURT: I haven't seen that.

BY MR. KINKEAD: I think, Your Honor, that 924 section is [7] designed for situations where the statute charges a subsequent offense but does not have a gun section in it and the bank robbery statute, 2113, has a gun section in it.

BY THE COURT: It says this, "Whoever uses a firearm in connection with such felonies shall in addition to the punishment provided for the commission of such felonies be sentenced to a term of not less than one year nor more than ten years" and then further on, "Nor shall the term of imprisonment imposed under this section run concurrently with any term of imprisonment imposed for the commission of such felony." It seems

to say that it imposess a mandatory sentence of not less than one year nor more than ten years. I have heard the request but also United States vs. Ramirez, 482 Fed 2d 807, decided by the Second Circuit. "Section 924C was enacted by Congress as part of the Gun Control Act of 1968. This section creates a separate crime rather than merely providing additional penalty." I don't believe the Court can make it concurrent, Mr. Kinkead, in view of that express finding of the statute, although they do both refer to—18 U. S. Code 924C, although they do both refer to firearms. All right, anything else on behalf of the defendants?

BY MR. PORTER, MR. KINKEAD: No, Your Honor.

[8] BY THE COURT: Gentlemen, I have looked at this pre-sentence report while you were examining it and it presents a most shocking picture as to the defendant Tommy Wayne Simpson. March 29, 1962, aged nine, stealing a .22 caliber Colt pistol, Bell County Juvenile Court, probated to parents. August 14, 1965, petit larceny, stealing a cicycle, Bell County Juvenile Court, disposition unknown. October 24, 1966, aged 14, grand larceny, auto stealing, Bell County Juvenile Court, committed to Child Welfare. January 27, 1968, breach of the peace, drawing a knife, Bell County Juvenile Court, placed under $500 peace bond for one year, probated. August 12, 1968, violation of curfew, destroying private property, Juvenile Court Bell County, re-committed to Child Welfare, transferred to Kentucky Village September 3, 1968. Had a home visit in December 1968, on December 28, 1968, he ran away. He was returned to Kentucky Village, declared absent without leave, discharged from the Department of Child Welfare September 29, 1971. February 21, 1970, absent without leave, Police Court Middlesboro, Kentucky, released to military authorities. February 25, 1970, absent without leave, Bell County Court, turned over to United States military authorities. March 24, 1970, absent without leave, Bell County Juvenile Court, Pineville, Kentucky, turned over to the United States Military authority. May 27, 1970, petit larceny, Knox County Criminal Court, Knoxville,

Tennessee, one year. Received at State [9] Reformatory, Nashville, Tennessee, September 14, 1970. His sentence was to expire on February 27, 1971. However, he escaped on January 29, 1971, 29 days before his sentence was to run out. March 17, 1971, Count 1, armed robbery, Count 2, malicious shooting and wounding with intent to kill, Bell Circuit Court, Pineville, Kentucky. Count 1, ten years, Count 2, two years consecutive. Received at the Kentucky State Reformatory May 14, 1971, escaped December 23, 1971. January 28, 1972, armed robbery, Knox County Criminal Court, Knoxville, Tennessee, March 30, 1972, 15 years. Received at State Penitentiary, Nashville, Tennessee, April 6, 1972, escaped from the state farm, March 15, 1973, arrested the same day. June 13, 1973, felonious escape, Lauderdale Circuit Court, Ripley, Tennessee, one year to be served consecutive to the sentence he was serving. June 13, 1975, petit larceny, Lauderdale Circuit Court, Ripley, Tennessee, one year concurrent with above sentence. Charged with stealing a car the day he escaped on or about March 15, 1973. October 31, 1973, murder, first degree, Dyer Circuit Court, Dyersburg, Tennessee, 20 years and one day. This happened while he was on escape, March 15, 1973. The sentence was to run consecutive to the sentence he was serving at the time of escape but concurrent with escape and petit larceny sentences. The sentence was to begin September 22, 1980, and probationary parole date was September 23, 1989, regular parole September 23, 1990, expiration date October 23, 1991. However, he escaped July 28, [10] 1975. October 28, 1975, robbery first degree, Bell Circuit Court, Pineville, Kentucky, pending. Co-defendants were Tommy Wayne Simpson and Robert Simpson. That was his brother who testified here. This involved the robbery of the Capital Finance, Middlesboro, Kentucky, August 13, 1975. October 28, 1975, robbery first degree, Bell Circuit Court, Pineville, Kentucky, pending. Co-defendant was Tony Wayne Sexton. This involved the robbery of the A & P store in Middlesboro, on August 9, 1975. October 28, 1975, robbery first degree, Bell Circuit Court, Pineville, Kentucky. The co-defendants were Mike Simpson, Donny

Morgan Crane, aiding, and Robert Simpson, aiding. This involved the robbery of the East End Branch of the Commercial Bank, Middlesboro, Kentucky, September 8, 1975. I believe that case is pending on this docket. You are not on trial for those things, Mr. Simpson. Anything you want to say about it? You have the right to but yo don't have to say anything. The Court does not consider them insofar as imposition of sentence in this case is concerned except insofar as it might affect whether you would be a parole risk which the Court would not consider under any circumstances—probation risk which the Court would not consider under any circumstances on the facts as disclosed by the evidence in this case. Anything you want to say?

BY TOMMY WAYNE SIMPSON: No, Your Honor.

[11] BY THE COURT: Mr. Michael Lee Simpson. September 16, 1970, shoplifting, Bell County Juvenile Court, Pineville, Kentucky, probated to parents. October 5, 1971, breaking and entering, Bell County Juvenile Court, certified to the grand jury, indicted October 8, 1971 on storehouse breaking, three counts. October 16, plea of guilty to count 1, amended charge of petit larceny and received a sentence of 12 months suspended except for time served. He served 120 days and counts 2 and 3 were dismissed. February 4, 1974, no operator's license, Police Court Middlesboro, $10 and costs. February 18, 1975, parking in a yellow zone, Middlesboro, Police Court, day to day. I guess that means continued. March 1, 1975, no operator's license, Police Court, Middlesboro, Kentucky, $10 and costs. May 22, 1975, murder by intentionally causing the drowning of Ralph Marsee, Bell Circuit Court, Pineville, Kentucky, pending. Co-defendant is Ellen May Marsee. October 10, 1975, robbery first degree, Bell Circuit Court, Pineville, Kentucky. Co-defendants are Tommy Wayne Simpson, Donald Morgan Crane, aiding, and Robert Simpson, aiding. This involves robbery of the East End Branch, Commercial Bank on September 8, 1975. That charge is pending I believe on this docket. You don't have to say anything but is there anything you want to say about this, Mr. Michael Lee Simpson?

BY MR. MICHAEL L. SIMPSON: No, sir.

[12] BY THE COURT: You are not on trial for any of those things. You have been tried on some of them and some of them are pending. They are something to be considered insofar as probation would be concerned. On the facts of this case I could not grant probation under any set of circumstances. It's a very serious case. Undisputed evidence, this robbery was committed by you two young men using firearms, locked these people in the vault, took the bank manager's car and due to a set of circumstances that were unforeseen the road was blocked and the officer happened to be there who knew you. A shooting incident occurred that has been described in the evidence. It is most regrettable. It is the Judgment of the Court that the defendant Tommy Wayne Simpson and Michael Lee Simpson, and each of them, be committed to the custody of the Attorney General of the United States for a period of twenty-five (25) years upon the charge contained in Count 1 of the indictment. It is the further judgment of the Court that defendants Tommy Wayne Simpson and Michael Lee Simpson, and each of them, be committed to the custody of the Attorney General of the United States for and additional period of ten (10) years on the charge contained in Count 2 of the indictment. That is to say, the sentence imposed on Count 2 of the indictment of ten years is to be served consecutive to and to begin at the expiration of the sentence heretofore imposed on Count 1 of the indictment, of 25 years, as [13] to each defendant, the total period of confinement to be a period of thirty-five (35) years. Now, Mr. Tommy Wayne Simpson and Mr. Michael Lee Simpson, it is my duty to advise you that as you were tried by a jury and found guilty you have the right to an appeal. If you are unable to defray the cost of an appeal you may be permitted to appeal in forma pauperis. The Court further finds that in imposing sentences on these gentlemen, Tommy Wayne Simpson and Michael Lee Simpson, that said defendants will not benefit from the provisions of the Youth Corrections Act and has declined to sentence them thereunder and has given a straight committed sentence herein. Madame

Clerk, will you please advise the defendants as to their rights?

BY THE CLERK: "I, the defendant, in the above styled case hereby acknowledge and state that the Court has advised me this 2nd day of February, 1976, of my right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis without cost to me.

"This statement was read to me by the Clerk in open court after the Court informed me of my right to appeal and the explanation by the Court of my right to appeal was clearly and fully understood by me." (signed by defendant.)

"Michael Lee Simpson. I, the defendant in the above styled case, hereby acknowledge and state that the Court has advised me this 2nd day of February, 1976, of my right [14] to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis without cost to me. This statement was read to me by the Clerk in open court after the Court informed me of my right to appeal and the explanation by the Court of my right to appeal was clearly and fully understood by me." (signed by defendant.)

BY THE COURT: Gentlemen, while the defendants Simpson are present, on this case 75-86 on the docket of this Court, charging these defendants with the offenses announced therein, I have entered an order assigning that case for trial three weeks from today February 23, at 9:30 in this courtroom. I have further entered an order directing the summoning of an additional 85 prospective jurors to sit in the trial of this case since this jury panel here has heard this case and are therefore perhaps disqualified to hear the second one. All right, gentlemen.

At this time the defendants were remanded to the Marshal and Court was adjourned.

[Court Reporter's certificate omitted in printing]

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

London Criminal No. 75-86

UNITED STATES OF AMERICA, PLAINTIFF

vs.

TOMMY WAYNE SIMPSON, DEFENDANT

TRANSCRIPT OF SENTENCING PROCEEDING—
February 24, 1976

The within transcript comprises the record on appeal as designated by the Federal Public Defender's Office, Lexington, acting upon behalf of the above defendant. The designation of record specifies the indictment, the allocution, the sentencing and the final judgment herein. This trial was held in the above Court beginning on February 23, 1976 and running on successive or subsequent days until completed, before the Honorable Bernard T. Maynahan, Chief Judge. The plaintiff herein was respresented by Mr. James Arehart, Assistant United States Attorney, and the defendant above was represented by Mr. Fred Fugazzi, Jr., of the Federal Public Defender's Office, Mr. Arehart in opening statement read the indictment, as follows:

BY MR. AREHART: "United States of America vs. Tommy Wayne Simpson and Michael Lee Simpson, United States District Court [2] for the Eastern District of Kentucky, London, London No. 75-86. Count 1: The Grand Jury charges that on or about the 8th day of September 1975, at Middlesboro, Bell County, Eastern District of Kentucky, Tommy Wayne Simpson and Michael Lee Simpson, did by force, violence and intimidation take from the person and presence of Joyce Day and Joy Bollinger, employees of the Commercial Bank, Middlesboro, Kentucky, the sum of $41,898.49, more or less, of

money belonging to and in the care, custody, control, management and possession of the East End Branch of the Commercial Bank of Middlesboro, Kentucky, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing the offense the said Tommy Wayne Simpson and Michael Lee Simpson did assault and put in jeopardy the lives of the aforesaid employees of the said bank by the use of dangerous weapons, to wit, handguns. Count 2: that on or about the 8th day of September 1975, at Middlesboro, Bell County, in the Eastern District of Kentucky, Tommy Wayne Simpson and Michael Lee Simpson used firearms, to wit, handguns, to commit a felony for which they may be prosecuted in a Court of the United States, that is, they used firearms to commit a felony as outlined in Count 1 of this indictment which is adopted by reference the same as if written in full herein."

VERDICT: We, the jury, find as to the charge contained in Count 1, Tommy Wayne Simpson guilty. . . We, the jury, find as [3] the charge contained in Count 2 the defendant, Tommy Wayne Simpson, guilty . . . John H. Marsh, Foreman.

BY THE COURT: Is that your verdict, members of the jury? Any question as to the form of the verdict upon behalf of either the United States or the defendants?

BY MR. AREHART: No, Your Honor.

BY THE DEFENSE: No, Your Honor.

BY THE COURT: Very well. Let the defendants come around. Let the record show the defendants and their counsel are present in the courtroom, the United States Attorney is present in the courtroom. Mr. Tommy Wayne Simpson and Mr. Michael Lee Simpson, each of you were indicted by the Grand Jury charged with the offense of bank robbery in violation of Title 18 Section 2113 A and B of the United States Code, in Count 1 of the indictment; you are charged with using firearms in connection with the commission of said bank robbery offense, in Count 2 of the indictment. You appeared with your attorneys, entered a plea of not guilty to the charges contained in the indictment. Thereafter a jury was empanelled to hear your case and the jury having heard the

evidence in the case, the arguments of counsel and the instructions of the Court, retired to consider [4] the case and subsequently returned into court a verdict finding each of you guilty of the charges contained in the two counts of the indictment. I want to ask you now if there is anything that either of you wishes to say or anything your attorneys wish to say before the judgment of the court is pronounced.

BY MR. FUGAZZI: If the Court please, on behalf of Mr. Tommy Wayne Simpson I want to state to the Court that on the 924C charge and the 2113 B charge should merge, as I have stated to the Court before.

BY THE COURT: Well, we had that similar issue come up in 75-87 and I ruled in that case that in my opinion, based on the only Circuit Court of Appeals case of record, that they did not merge and I am of the opinion that if you read the applicable case law they do not merge. I believe that other case is in the process of being appealed.

BY MR. FUGAZZI: Yes, Your Honor.

BY THE COURT: I understand your request but the statutes and the legislative history indicates an intention to impose an additional punishment. All right. Anything else?

BY MR. FUGAZZI: No, Your Honor.

[5] BY MR. WILMOTT: Your Honor, I would make the same request on behalf of Michael Lee Simpson.

BY THE COURT: And I make the same opinion and perhaps it will be resolved in the Sixth Circuit Court of Appeals and perhaps eventually by the Supreme Court. The only applicable case law on it I could find in the Circuit Court was contrary to the position that you gentlemen take. I think that is binding on it in the absence of something different from the Sixth Circuit. All right. Anything else, gentlemen?

BY THE DEFENSE: No, Your Honor.

BY THE COURT: Anything, Mr. Tommy Wayne Simpson?

BY MR. TOMMY SIMPSON: No, sir, there isn't.

BY THE COURT: Anything you wish to say, Mr. Michael Lee Simpson?

BY MR. MICHAEL SIMPSON: No, sir.

BY THE COURT: Well, I note, Mr. Tommy Wayne Simpson, March 29, 1962, stealing a .22 caliber Colt, Bell County Juvenile [6] Court, probated. August 14, 1965, petit larceny, stealing a bicycle, Bell County Juvenile Court, disposition unknown. October 24, 1966, grand larceny, auto stealing, Bell County Juvenile Court, committed to Child Welfare. January 27, 1968, breach of the peace, drawing a knife, Bell County Juvenile Court, placed under $500 peace bond for one year, probated. August 12, 1968, violation of curfew, destroying private property, Bell County Juvenile Court, re-committed to Child Welfare. Returned as placement violator on August 17, 1968, transferred to Kentucky Village September 3, 1968, given a home visit in December 1968, December 28, 1968, ran away, declared absent without leave, discharged September 29, 1971. February 21, 1970, absent without leave, Police Department, Middlesboro, Kentucky, released to the military authorities. February 25, 1970, absent without leave, Bell County Court, Pineville, Kentucky, turned over to United States Military Police. March 24, 1970, absent without leave, Bell County Court, Pineville, Kentucky, turned over to U.S. Military Police. May 27, 1970, petit larceny, Knox County Court, Knoxville, Tennessee, one year. Sentence was to expire February 27, 1971. However, he escaped January 28, 1971. March 17, 1971, Bell Circuit Court, Count 1, armed robbery, Count 2, malicious shooting wounding with intent to kill. Count 1, ten years and Count 2, two years consecutive, received at State Reformatory, LeGrange, Kentucky, May 14, 1971, escaped December 23, 1971. January 28, 1972, armed robbery, [7] Knox County Criminal Court, Knoxville, Tennessee, 15 years. Received at State Penitentiary April 6, 1972, escaped from State Farm March 15, 1973. Arrested the same day. June 13, 1973, felonious escape, Lauderdale Circuit Court, Ripley, Tenessee, one year to be served consecutive to the sentence he was then serving. That's the same escape. June 13, 1973, petit larceny, Lauderdale Circuit Court, Ripley, Tennessee, one year concurrently to above sentence. Charged with stealing a car on the day he escaped, on

March 15, 1973. October 31, 1973, murder in the first degree, Dyer Circuit Court, Dyersburg, Tennessee, 20 years and one day. This happened while he was on escape. The sentence was to run consecutive to the sentence he was serving at the time of the escape but concurrent with the escape and petit larceny sentence from Lauderdale County. Sentence was to begin September 22, 1980, and probationary parole was September 23, 1989, regular parole September 23, 1990, expiration dated October 23, 1991. However, he escaped July 28, 1975. October 28, 1975, robbery first degree, Bell County Circuit court, Pineville, Kentucky, pending. This involves the robbery of Capital Finance, Middlesboro, Kentucky, on August 13, 1975. October 28, 1975, robbery first degree, Bell Circuit Court, Pineville, Kentucky, pending. This involves a robbery of the A & P Store, Middlesboro, Kentucky, August 9, 1975. October 28, 1975, robbery, first degree, Bell Circuit Court, pending. The defendants were Mike Simpson, Donna Crane [8] and Robert Simpson. This involved the robbery of the East End Branch of the Commercial Bank, Middlesboro, Kentucky, on September 8, 1975. That's the charge that you were tried on here today. Classification material from the Kentucky Department of Corrections, Frankfort, Kentucky, involving the 12-year sentence which the defendant received May 10, 1971, for armed robbery and malicious shooting and wounding with intent to kill. This was out of the Bell Circuit Court, Pineville, Kentucky, and the defendant's statement of the classification study, states, "My wife and I were stranded in Harrogate, Tennessee. Mark Johnson came along and picked us up. When we got to Middlesboro he demanded pay and I told him I had no money. He grabbed my wife by the leg and said he would just as soon take it out in trade of my wife. I grabbed him and in the scuffle he pulled a .22 pistol and I knocked it out of his hand. He came at me. I shot him four times in the head. During the scuffle he lost his money and I picked it up." However, the version in Middlesboro is considerably different. According to certain authorities, Tommy Simpson and his wife were on a rural road in Tennessee on a stolen motorcycle. Tommy Simp-

son was in escape status, having recently escaped from state custody in Tennessee. The motorcycle stalled and Simpson went to a store and told the owner that his wife was ill and need to be rushed to the Middlesboro Clinic. A man brought them to Middlesboro. When they arrived, the wife jumped out of the car and ran to Simpson's [9] parents' home, which was located near the Middlesboro Clinic. Simpson then pulled a gun and forced the man to drive into a cemetery in Middlesboro, robbed him and told him to get out of the car and lie face down. Simpson shot the man five times in the back of the head. That's so much for that, except it leaves out one thing. Give me No. 75-87, please, ma'am. Do you have the record in here? Well, No. 75-87 charges—No.75-87 on which you were tried in this Court on February 2nd charges you and each of you with the robbery of the West End Branch of the Commercial Bank of Middlesboro by use of firearms. And you were convicted and the evidence in that case was that you went into the West End Branch of this bank, robbed the employees of the bank under similar conditions. You took the bank manager's car and started out through Cumberland Gap and unfortunately for you all, the road was blocked there where they were trying to pull a car back up right near the Virginia border with the wrecker and the Deputy Sheriff from Middlesboro was up there at the scene and had got the report that you had robbed the bank. You were then in the bank manager's car and then when he advanced on you where you were stopped by traffic, each one of you had a gun. Mr. Michael Simpson had the automatic that the Government had here but which it was unable to show was used in this robbery. You made a menacing movement toward the officer, at which point he shot Mr. Michael Simpson, went back behind the quarter panel of the car and shot Mr. Tommy Wayne Simpson. Mr. [10] Tommy Wayne Simpson had a revolver in his left hand and was trying to back up the car and get away, had to change the gears. So about 60 days apart as I recall you robbed the East End Branch of $41,000 odd and you robbed the West End Branch of the same bank of some $41,000. In the second case you still had the money

behind the seat in this pillow case. Very brassy fellows. Of course, you have already been sentenced to 35 years, Mr. Tommy Wayne Simpson, on the robbery of the West End Branch. Now, you appear before this Court for sentencing for robbing the East End Branch.

Now, Mr. Michael Lee Simpson, September 16, 1970, shoplifting, Bell County Juvenile Court, Pineville, Kentucky, probated. October 5, 1971, breaking and entering, Bell County Juvenile Court, certified to the Grand Jury. Indicted for storehouse breaking, three counts. October 16, you entered a plea of guilty to count 1 amended to petit larceny, received a sentence of 12 months suspended except for time served. He served 128 days. Counts 2 and 3 were suspended. February 1, 1974, no operator's license, Police Court, Middlesboro, Kentucky, $10 and cost. February 18, 1975, parking in a prohibited zone. Police Department, continued. March 7, 1975, no operator's license, Police Court, Middlesboro, May 27, 1975, murder by intentionally causing the drowning of Ralph Marsee, Bell Circuit Court, pending. Co-defendant is Ellen May Marsee. As I recall, the wife of the man that was drowned, or alleged to have drowned. [11] October 28, 1975, robbery, first degree, Bell Circuit Court, Pineville, Kentucky. This involves the robbery of the East End Branch of the Commercial Bank on September 8, 1975. That is the offense for which you have been convicted here. You are also indicted in 75-87 with Tommy Wayne Simpson of robbing the West End Branch of the same bank and, as he was, you were heretofore convicted in this Court on that charge and received a 35 year sentence. Now, you are only on trial, gentlemen, on the charge contained in this case. But I don't believe I have ever seen such gangster tactics out of such relatively young men. You robbed these two banks. There is no doubt of that. You have been convicted of that. You have been charged and convicted of some of these other things. You are not on trial for those things. But it is terrible that in a town the size of Middlesboro with a population of about 12,000 people that you go over on one end of town and rob one bank and then come back in two months and rob the one on the other end

and get away with $40,000 each time. The evidence was that you were big, brave fellows, took these pistols and poked in these young women's faces, told this young man to put his hands up on the table and scoot back. The public is entitled to protection and this thing of just coddling these kinds of terrible offenses as far as I am concerned has to stop. It is the judgment of the Court that in this case the defendants, Tommy Wayne Simpson and Michael Lee Simpson, and each of them, be committed to the [12] custody of the Attorney General of the United States for a period of 25 years on the charge contained in Count 1 of the indictment. Further, it is the judgment of the Court that the defendants and each of them be committed to the custody of the Attorney General of the United States for an additional period of ten years on the charges contained in Count 2 of the indictment, the two sentences to be served consecutively, total sentence to be 35 years, and that sentence imposed in this case, in each of these cases, to be served consecutively to the sentences heretofore imposed on said defendants in this Court on February 2, 1976 in No. 75-87. The sentences this day imposed are to be served consecutively to one another and to be served consecutively—that is, to begin at the expiration of the sentences heretofore imposed for the robbery of the West End Branch of this bank. All of these sentences to be served consecutively. That is, one in addition to the other. The public is entitled to some protection and I just am appalled that you would come into a town like Middlesboro and just attempt to take over a bank. Like a bunch of highwaymen and thugs. All right. The Court further finds that the defendants will not benefit from the provisions of the Youth Corrections Act and declines to sentence the defendants thereunder. It's my duty under the law to advise each of you that as you were tried by a jury and found guilty, you have a right to an appeal. If you are unable to defray the cost of an appeal you may be [13] permitted to appeal in forma pauperis upon making the proper showing. Read the statement to them as to their right of appeal.

BY THE CLERK: Yes, Your Honor. London Crim-

inal No. 75-86, United States of America v. Tommy Wayne Simpson. I, the defendant in the above-styled case, hereby acknowledge and state that the Court has advised me this 24th day of February, 1976, of my right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis without cost to me. This statement was read to me by the Clerk in open court after the Court informed me of my right to appeal and the explanation by the Court of my right to appeal was clearly and fully understood by me. (signed by defendant and counsel.)

London Criminal No. 75-86, United States of America v. Michael Lee Simpson. I, the defendant in the above-styled case, hereby acknowledge and state that the Court has advised me this 24th day of February 1976, of my right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis without cost to me. This statement was read to me by the Clerk in open court after the Court informed me of my right to appeal and the explanation by the Court of my right to appeal was clearly and fully understood by me. (Signed by defendant and counsel.)

[14] BY THE COURT: Now, gentlemen, counsel has been provided with the statement of duties of counsel in connection with the any contemplated appeal. Let the record show—let them be so provided and let the record show that they have been so provided. Now, the Court further recommends that these defendants not be considered for parole when eligible. Their history of violence indicates that they constitute a menace to society and society is entitled to be protected. All right. Let the defendants be remanded to the custody of the Marshal. * * *.

[Court Reporter's certificate omitted in printing]

D. Def. [redacted]

United States of America vs.

United States District Court for

DEFENDANT: TOMMY WAYNE SIMPSON

EASTERN DISTRICT OF KENTUCKY
LONDON

DOCKET NO. 75-87

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: February 2, 1976

at Lexington

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Shelby Kinkead, Jr.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [XX] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[XX] GUILTY. to Counts 1 and 2

Defendant has been convicted as charged of the offense(s) of Bank robbery and assaulting and putting in jeopardy lives of bank employees by use of dangerous weapons, in violation of Title 18, Section 2113(a)(d), U.S.Code and using firearms to commit a felony, in violation of Title 18, Section 924(c) U.S.Code

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWENTY FIVE (25) YEARS on Count One
TEN (10) YEARS on Count Two

Imprisonment on Count Two to be served consecutive to and to begin at the expiration of service of sentence in Count One.

SPECIAL CONDITIONS OF PROBATION

The Court finds that the defendant will not benefit under the provisions of the Youth Corrections Act and declines to sentence under said Act.

A presentence report was submitted to the Court before imposition of sentence and copies were furnished to counsel for the defendant and counsel for the plaintiff, pursuant to Rule 32, F.R.C.P.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Filed FEB 5 1976

CERTIFIED AS A TRUE COPY ON THIS DATE FEB 5 1976

By Kathleen C. Willis
( ) CLERK
(X) DEPUTY

SIGNED BY
[XX] U.S. District Judge
[ ] U.S. Magistrate

BERNARD T. MOYNAHAN, JR.

Bernard T. Moynahan, Jr., Judge FEB 5 1976
Date Received Date Entered

2 4 25

Post dep.

United States of America vs.

United States District Court for

DEFENDANT: MICHAEL LEE SIMPSON

EASTERN DISTRICT OF KENTUCKY
LONDON

DOCKET NO. 75-87

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: February DAY: 2 YEAR: 1976

at Lexington

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Shelby Kinkead, Jr. and J. David Porter
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [XX] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[XX] GUILTY. to Counts 1 and 2

Defendant has been convicted as charged of the offense(s) of Bank robbery and assaulting and putting in jeopardy lives of bank employees by use of dangerous weapons, in violation of Title 18, Section 2113(a)(d), U.S.Code and using firearms to commit a felony, in violation of Title 18, Section 924(c) U.S.Code

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWENTY FIVE (25) YEARS on Count One
TEN (10) YEARS on Count Two

Imprisonment on Count Two to be served consecutive to and to begin at the expiration of service of sentence in Count One.

The Court finds that the defendant will not benefit under the provisions of the Youth Corrections Act and declines to sentence under said Act.

SPECIAL CONDITIONS OF PROBATION

A presentence report was submitted to the Court before imposition of sentence and copies were furnished to counsel for the defendant and counsel for the plaintiff, pursuant to Rule 32, F.R.C.P.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Filed FEB 5 1976
CERTIFIED AS A TRUE COPY ON
THIS DATE FEB 5 1976
BY [signature] ( ) CLERK (✓) DEPUTY

SIGNED BY
[XX] U.S. District Judge
[ ] U.S. Magistrate

BERNARD T. MOYNAHAN, JR.

Bernard T. Moynahan, Jr., Judge
February 5 1976

United States of America vs.

United States District Court for

DEFENDANT: TOMMY WAYNE SIMPSON

EASTERN DISTRICT OF KENTUCKY

LONDON

DOCKET NO. 75-86

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: February DAY: 24, YEAR: 1976

at Lexington

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Fred Fugazzi, Jr. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being ~~a~~/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. Counts 1 and 2

Defendant has been convicted as charged of the offense(s) of bank robbery and assaulting and putting in jeopardy lives of bank employees by use of dangerous weapons, in violation of Title 18, Section 2113(a)(d), United States Code; using firearm to commit a felony, in violation of Title 18, Section 924(c), United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWENTY FIVE (25) YEARS on Count One
TEN (10) YEARS on Count Two

Imprisonment in above sentences to be served consecutive to one another and to be served consecutive to the sentence heretofore imposed on said defendant in this court on February 2, 1976 in London Criminal number 75-87.

SPECIAL CONDITIONS OF PROBATION

The Court finds that the defendant will not benefit from the provisions of the Federal Youth Corrections Act and declines to sentence thereunder.

ADDITIONAL CONDITIONS OF PROBATION

A presentence report was submitted to the Court before imposition of sentence.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

that the defendant not be considered for parole when eligible.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE Feb 26, 1976
BY Nancy C Anderson
( ) CLERK
(X) DEPUTY

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Bernard T. Moynahan, Jr., Judge

United States of America vs.

United States District Court for

DEFENDANT: MICHAEL LEE SIMPSON

EASTERN DISTRICT OF KENTUCKY

LONDON

DOCKET NO. 75-86

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: February DAY: 24, YEAR: 1976

at Lexington

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Robert Willmott (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. counts 1 and 2

Defendant has been convicted as charged of the offense(s) of bank robbery and assaulting and putting in jeopardy lives of bank employees by use of dangerous weapons, in violation of Title 18, Section 2113(a)(d), United States Code; using firearm to commit a felony, in violation of Title 18, Section 924(c), United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWENTY FIVE (25) YEARS on Count One
TEN (10) YEARS on Count Two

Imprisonment in above sentences to be served consecutive to one another and to be served consecutive to the sentence heretofore imposed on said defendant in this court on February 2, 1976 in London Criminal number 75-87.

SPECIAL CONDITIONS OF PROBATION

The Court finds that the defendant will not benefit from the provisions of the Federal Youth Corrections Act and declines to sentence thereunder.

A presentence report was submitted to the Court before imposition of sentence.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant not be considered for parole when eligible.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Eastern District of Kentucky
FILED
FEB 26 1976
At LEXINGTON
DAVIS T. McGARVEY
CLERK, U.S. DISTRICT COURT

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Bernard T. Moynahan, Jr., Judge

Date February 26, 1976

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 76-1459, -1460, -1465, -1466

Nos. 76-1459 & -1466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs

MICHAEL LEE SIMPSON, DEFENDANT-APPELLANT

Nos. 76-1460 & -1465

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs

TOMMY WAYNE SIMPSON, DEFENDANT-APPELLANT

ORDER—Filed Oct. 14, 1976

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration of the record, the briefs and oral arguments of counsel we are of the opinion that the defendants were properly charged with the armed robbery of two banks, on different occasions, and were convicted by juries in two trials, and they received consecutive sentences for violations of 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c).

The two statutes, in our opinion, relate to separate offenses involving different elements, and they are not duplicitous. *United States* v. *Crew*, —— F.2d —— (4th Cir. No. 75-1581, 1976). *Perkins* v. *United States*, 526

F.2d 688 (5th Cir. 1976). The District Court was not required to impose concurrent sentences for the two separate bank robberies nor under the two statutes.

Finding no prejudicial error either in the convictions or in the sentences, it is ORDERED that the judgments of conviction be and they are hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 76-1459, -1460, -1465, -1466

Nos. 76-1459 & -1466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs

MICHAEL LEE SIMPSON, DEFENDANT-APPELLANT

Nos. 76-1460 & -1465

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs

TOMMY WAYNE SIMPSON, DEFENDANT-APPELLANT

ORDER—Filed Nov. 9, 1976

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration it is ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

SUPREME COURT OF THE UNITED STATES

No. 76-5761

MICHAEL LEE SIMPSON and TOMMY WAYNE SIMPSON, PETITIONERS

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 76-5796 and a total of one hour is allotted for oral argument.

April 18, 1977

SUPREME COURT OF THE UNITED STATES

No. 76-5796

MICHAEL LEE SIMPSON, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 76-5761 and a total of one hour is allotted for oral argument.

April 18, 1977

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 236925 18

Nos. 76-5761 and 76-5796

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

MICHAEL LEE SIMPSON and TOMMY WAYNE SIMPSON, PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL LEE SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
WILLIAM OTIS,
MARYE WRIGHT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5761

MICHAEL LEE SIMPSON and TOMMY WAYNE SIMPSON, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 76-5796

MICHAEL LEE SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. No. 76-5761 App. 1-3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1976. A petition for rehearing was denied on November 17, 1976. The petition for a writ of certiorari in No. 76-5761 was filed on November 26, 1976, and in No. 76-5796, on December 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant's conviction for aggravated bank robbery under 18 U.S.C. 2113(d) automatically precludes a simultaneous conviction and consecutive sentence for using a firearm during the robbery, in violation of 18 U.S.C. 924(c)(1).

STATUTES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;
>
> * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. 924(c) provides:

> Whoever--
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of the law, the court shall not suspend the

sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of aggravated bank robbery and of using firearms to commit the robbery, in violation of 18 U.S.C. 2113(a) and (d) and 924(c)(1). Each was sentenced to consecutive terms of 25 years' imprisonment on the robbery count and 10 years' imprisonment on the firearm count. After another jury trial for a second robbery, petitioners were again convicted of one count of aggravated bank robbery and one count of using firearms to commit the crime. Each was sentenced to 25 years' imprisonment for the robbery and 10 years' imprisonment on the firearm count, the sentences to run consecutively to each other and to the sentences previously imposed. The court of appeals affirmed in a consolidated appeal (Pet. App. 1-3). 1/

On Sept mber 18, 1975, petitioners robbed the East End Branch of the Commercial Bank of Middlesboro, Kentucky at gunpoint. They took approximately $40,000 from the bank. Less than two months later, on November 4, 1975, petitioners returned to Middlesboro to rob the West End Branch of the Commercial Bank. This robbery was also accomplished at gunpoint, and again about $40,000 in bank funds was taken.

To accomplish their escape after the second robbery, petitioners stole the bank manager's automobile after locking the bank personnel in the vault. A police roadblock was set up outside town, and, after an exchange of gunfire, petitioners were taken into custody.

1/ "Pet." denotes the petition in No. 76-5761 and "Pet. App." denotes the appendix to that petition.

ARGUMENT

Petitioners contend (Pet. 4-5) that the court of appeals erroneously upheld their firearms convictions under 18 U.S.C. 924(c), after they had been convicted of aggravated bank robbery under 18 U.S.C. 2113(d), and that the decision below conflicts with the decision of the Court of Appeals for the Eighth Circuit in United States v. Eagle, 539 F.2d 1166. Although we believe that the court of appeals correctly rejected petitioners' contention in this case, we recognize that a conflict among the circuits exists on this issue and thus do not oppose the petitions for certiorari.

1. Section 924(c), passed as part of the Gun Control Act of 1968, makes it a federal offense for a person to use or unlawfully carry a firearm during the commission of "any felony for which he may be prosecuted in a court of the United States" (emphasis added). For a first offender, the punishment is set at not less than one nor more than ten years' imprisonment, "in addition to the punishment provided for the commission of [the underlying] felony." More severe sanctions are imposed upon a second or multiple offender, who faces an additional sentence of at least two and as many as 25 years' imprisonment without possibility of a suspended sentence or probation. Concurrent sentences are expressly prohibited.

Petitioners were convicted of aggravated bank robbery under 18 U.S.C. 2113(a) and (d). For the crime of bank robbery defined in subsection 2113(a), the maximum penalty is a $5,000 fine and 20 years' imprisonment. Subsection 2113(d) states, however, that "[w]hoever, in committing, or attempting to commit, any offense defined in [2113(a) or (b)] assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not

more than twenty-five years, or both." It is unquestioned, of course, that a conviction under Sections 2113(a) or (d) is a felony; [2] the sole question is whether, despite the language "any felony" used in Section 924(c), Congress intended that a conviction under Section 2113(d) would bar an additional conviction under 924(c).

We do not believe that Congress so intended. On its face the language of Section 924(c), applying to "any felony" that may be prosecuted in federal court, admits of no exceptions. In addition, that Section contains important provisions that apply solely to this statute and are not incorporated into other statutes, such as 18 U.S.C. 2113(d), providing for enhanced penalties. Thus, Section 924(c) establishes minimum sentences (without possibility of suspension or probation in the case of repeat offenders), imposes more severe punishment on repeat offenders, and prohibits concurrent sentencing. These specific provisions would be completely displaced by the reasoning of the court of appeals.

Comparison between Section 924(c) and Section 2113(d) leads to a similar conclusion. The test for determining whether Congress intended to define and punish separate offenses is "whether each provision requires proof of a fact which the other does not" (Blockburger v. United States, 284 U.S. 299, 304). Under Section 924(c), the prosecution must prove that the defendant used or unlawfully carried a firearm during commission of a federal felony; under Section 2113(d), the prosecution need not show use or possession of a firearm but must prove either an assault or the placing of a life in jeopardy "by the use of a dangerous weapon or device" (emphasis added). [3] According to the Blockburger test, therefore, the offenses are clearly separate and subject to cumulative punishment. Moreover, it would produce a curious result to hold that the possibility of an additional five year sentence under Section 2113(d) would free a defendant from a possible 10 year sentence (with a one year minimum) under Section 924(c), while also relieving him from operation of the other specific provisions discussed above. [4]

To override the strong evidence of congressional intent expressed in Section 924(c), any contrary legislative history should be compelling. Petitioners, like the Eighth Circuit in United States v. Eagle, supra, rely solely upon a statement by Representative Poff during floor debates that "this section is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officials, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other firearm felonies" (114 Cong. Rec. 22232). Although these remarks, viewed in isolation, suggest an intent to render Section 924(c) inapplicable in a case such as this, we nevertheless do not believe that they will bear the weight that petitioners place upon them.

The debates on the Poff amendment show a commitment by Congress to limit the use of guns in federal crimes. Indeed, Congressman Poff, shortly after making the statement quoted above, stated plainly: "My amendment would apply to all Federal felonies including heinous crimes in all grades, down to

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2/ A felony is defined in 18 U.S.C. 1 as "[a]ny offense punishable by death or imprisonment for a term exceeding one year."

3/ The courts of appeals have disagreed over whether the words "by the use of a dangerous weapon or device" modify the word "assault". Compare United States v. Beasley, 438 F.2d 1279 (C.A. 6), with Bradley v. United States, 447 F.2d 264 (C.A. 8).

4/ This disparity would be even more marked in the case of the repeat offender, who could be sentenced to as many as 25 years' imprisonment under Section 924(c), but would remain exposed to only five additional years of imprisonment under Section 2113(d), no matter how many times in the past he had been convicted of using a firearm in the commission of a federal felony.

the lowest level of a felony" (114 Cong. Rec. 22233). In particular, the debates show an intention to impose mandatory minimum sentences in all cases involving firearms, "to persuade the man who is tempted to commit a federal felony to leave his gun at home" (114 Cong. Rec. 22231). The concern, moreover, was with firearms, not merely with dangerous weapons; "[e]ven where the crime does not result in death or injury, the use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons affective only at a very short range" (114 Cong. Rec. 22247) (Rep. Horton). Under the circumstances, the need for imposing the additional sanctions of Section 924(c) on felons employing firearms seems plain.

2. The Court of Appeals for the Eighth Circuit in United States v. Eagle, supra, has held invalid the conviction under Section 924(c) of a defendant also convicted of assault with a dangerous weapon under 18 U.S.C. 1153. Placing heavy reliance on the statement by Representative Poff set forth above, the court reasoned that "[i]t is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive statute itself does so." (539 F.2d at 1172).

For the reasons stated in the previous section, we believe that the decision of the Eighth Circuit in Eagle is incorrect. We recognize, however, that the decision of the court of appeals in this case is in conflict with the decision in Eagle, and for that reason, we do not oppose granting the petition for a writ of certiorari.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5761

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TOMMY WAYNE SIMPSON,

Petitioners,

v.

UNITED STATES OF AMERICA.

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MICHAEL LEE SIMPSON,

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UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and may be found in the joint Appendix (Page 29). The opinion denying the petition for rehearing is also unreported and may be found in the joint Appendix (Page 31).

JURISDICTION

The judgment of the Court of Appeals was rendered on October 14, 1976. The petition for rehearing was denied on November 9, 1976. The petitions for certiorari and motions to proceed in forma pauperis were filed November 26, 1976 and December 3, 1976, and granted April 18, 1977.

QUESTION PRESENTED

Whether both a conviction and sentence for aggravated bank robbery under 18 U.S.C. §2113(d) and a conviction and sentence for use of a firearm during the commission of a felony under 18 U.S.C. §924(c) can be assessed when both convictions and sentences resulted from the same set of factual circumstances?

STATUTES INVOLVED

Title 18 U.S.C. §2113(d);

"Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

Title 18 U.S.C. §924(c);

"Whoever–

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

STATEMENT OF THE CASE

The petitioners were convicted on February 2 and February 24, 1976, United States District Court for the Eastern District of Kentucky for two (2) separate armed bank robberies in violation of 18 U.S.C. §2113(d). At the same time they were convicted for the offense of using a firearm to commit a felony in violation of 18 U.S.C. §924(c). The Court sentenced each petitioner to twenty-five (25) years for each bank robbery and to ten (10) years for each firearm felony, all sentences to be served consecutively. The proof at trial demonstrated that the petitioners flourished handguns during the commission of the bank robberies. The bank robberies were the felonies to which the firearm convictions pertained.

Timely notices of appeal were filed and the cases were presented to the United States Court of Appeals for the Sixth Circuit. On October 14, 1976, after consolidating the cases, the

United States Court of Appeals for the Sixth Circuit entered an order affirming the decision of the lower court. A timely petition for rehearing was filed and the United States Court of Appeals for the Sixth Circuit denied same on November 9, 1976.

Timely petitions for certiorari were filed along with motions of the petitioners for leave to proceed in forma pauperis on November 26, 1976 and December 3, 1976. On April 18, 1977, the Supreme Court of the United States granted petitioners' motions for leave to proceed in forma pauperis and petitions for writ of certiorari.

ARGUMENT

ALLOWING A COURT TO IMPOSE SENTENCES FOR AN AGGRAVATED BANK ROBBERY CONVICTION 18 U.S.C. §2113(d) AND USE OF A FIREARM TO COMMIT A FELONY 18 U.S.C. §924(c) WHEN BOTH CONVICTIONS RESULT FROM THE SAME SET OF FACTUAL CIRCUMSTANCES AMOUNTS TO DUPLICITOUS SENTENCING AND SHOULD BE PROHIBITED.

The legislative history of 18 U.S.C. §924(c) indicates that the purpose of the statute is to deter the use and carrying of firearms in the commission of felonies against the laws of the United States. Congress intended that additional punishment be authorized when a firearm is used in the commission of a felony, however, the legislative history clearly demonstrates that where the statute charging the substantive crime includes a provision which provides a higher penalty for use of a dangerous weapon or firearm, §924(c) is not applicable. Obviously, in such a situation, the deterrent function of §924(c) is served by the statute charging the substantive crime.

The remarks of Representative Poff, §924(c)'s sponsor, during the House Committee Hearing on the statute include the following:

> "My substitute makes it a separate federal crime to use a firearm in the commission of another federal crime and invokes separate and supplemental penalties." *114 Congressional Record, 2231.*
>
> "The affect of a minimum mandatory sentence. . .is to persuade the man who is tempted to commit a federal felony to leave his gun at home." *114 Congressional Record, 2231.*

From these comments it is clear that the statute's sponsor believed that imposition of a separate and supplemental penalty for felonies committed with a firearm would deter the use of firearms.

Representative Poff went on to state:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18 §111, 112 or 113 which already define the penalties for use of a firearm in assaulting officials, with *§2113* or *2114 concerning armed robberies of the mail or bank.* With §2231 concerning armed assaults upon process servers or Chapter 44 which defines other firearm felonies." *114 Congressional Record, 2232, emphasis added.*

If the purpose of §924(c) is, as stated by Representative Poff, to deter the use of a firearm in the commission of a felony, that purpose is nullified when the substantive offense provides enhanced punishment for the use of a dangerous weapon or device which necessarily includes a firearm.

In *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976) the Court held that where the statute controlling the charged crime enhances penalty for use of a dangerous weapon, then §924(c) cannot be joined in the indictment. In *Eagle* the appellant was charged under 18 U.S.C. §1153 for an assault with a deadly weapon against an Indian in Indian country. The Court of Appeals concluded that §1153 was the same type of statute as those excluded from use with §924(c) by Representative Poff, *supra 114 Congressional Record*, 2232, and therefore held that the appellant's conviction under §924(c) be vacated. In reaching its decision the Court of Appeals for the Eighth Circuit reasoned:

"Appellant contends that although the statutory language is broad ('any felony'), Congress did not in fact intend that a prosecution for violating §924(c) would be available where the underlying felony is that charged here, an assault with a dangerous weapon in violation of 18 U.S.C. §1153, the Major Crimes Act. We agree, and so vacate the Count 11 conviction. Page 1171.

We reach this result first because §1153 itself provides an increased penalty for use of a dangerous weapon. We are convinced that Congress did not intend §924(c)(1) to be applicable in a case involving such a statute.

We are led to the conclusion by the legislative history of §924(c)(1).

It is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive statute itself does so. Page 1172.

The existing statutes, by providing federal sanctions only if firearms are used, perform the function of deterrence. Application of §924(c)(1) to the crime is not necessary, and apparently was not intended by Congress." Page 1172.

A contrary result was reached by the Court of Appeals for the Fifth Circuit in *United States v. Perkins*, 526 F.2d 688 (5th Cir. 1976). In *Perkins* the Court upheld a conviction for §924(c)(2) when joined with a prosecution under §2113(d). The Court found that the elements of §2113(d) were different from those in §924(c)(2) and stated:

"To convict for a violation of §924(c)(2), the Government must prove, in *addition* to the elements necessary to prove a violation of §2113(a) and (d), that appellant carried a *firearm*, not just a dangerous weapon, and that he carried it *unlawfully*. The elements of 'firearm' and 'unlawfully' are unique to the §924(c)(2) count. Unlawfulness is not an element of §2113(d) and §2113(d)'s element of a dangerous weapon may consist of various instruments, only one of which is a firearm. The fact that a firearm happened to be the dangerous weapon in this particular case does not alter the fact that 'firearm' and 'dangerous weapon' are not coterminous elements." 526 F.2d at 690.

Similarly, in *United States v. Crew*, 538 F.2d 575 (4th Cir. 1976), the Court of Appeals for the Fourth Circuit held that consecutive sentences under §924(c) and §2113(d) were proper because the offenses were not identical and required proof of distinguishable elements; that a firearm as opposed to a dangerous weapon or device was carried or used.

To hold that §924(c) and §2113(d) do not contain coterminous elements because of the use of the word "firearm" as opposed to "dangerous weapon" or "device" is a tenuous sematical argument. Certainly it cannot be gainsaid that Congress intended the words "dangerous weapon" or "device" as used in §2113(d) to include "firearms". *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969).

Assuming arguendo that there is a valid distinction, no matter how thin, between the words "firearm" and "dangerous weapon", the indictments in the case at bar use the following language:

2113(d) –

". . . by use of dangerous weapons, to wit, handguns.". (App. 2, 4)

924(c)(1) –

". . . used firearms, to wit, handguns, to commit a felony. . ." (App. 3, 5)

Therefore any possible distinction was removed by virtue of the actual words in the indictments. Since the definitions of a "dangerous weapon" and a "firearm" became coterminous by the wordage of the indictments, the elements to prove each offense became identical. Thus the dictates as set forth in *Blockburger v. United States*, 284 U.S. 259 (1932) wherein this court stated:

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (284 U.S. at 304)

become applicable. Once the government had shown that the bank robbery had been committed and that a handgun had been used to commit the crime, all elements of both crimes were satisfied.

CONCLUSION

The legislative history of §924(c) demonstrates that Congress did not intend it to be joined in an indictment brought under §2113(d). Moreover, under the facts of these cases there are no distinguishable elements between the §2113(d) charges and the §924(c) charges. Therefore, the judgments of convictions as to §924(c) are duplicitous and should be vacated.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The unpublished order of the court of appeals (App. 29-30) is noted at 542 F.2d 1177.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1976 (App. 29). A petition for rehearing was denied on November 9, 1976 (App. 31). The petition for a writ of certiorari in No. 76-5761 was filed on November 26, 1976, and in No. 76-5796 on December 3, 1976. The petitions were granted on April 18, 1977 (App. 32-33). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant convicted of assault or endangering life by "the use of a dangerous weapon" during a bank robbery, in violation of 18 U.S.C. 2113(d), can be convicted and consecutively sentenced for using a firearm during the robbery, in violation of 18 U.S.C. 924(c).

STATUTES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; * * *
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> * * * * *

> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. 924(c) provides:

> Whoever—
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of aggravated bank robbery and of using firearms to commit the robbery, in violation of 18 U.S.C. 2113(a) and (d) and 924(c). Each was sentenced to consecutive terms of 25 years' imprisonment on the robbery count and 10 years' imprisonment on the firearms count (App. 25-26). After another jury trial for a second robbery, petitioners were again convicted of one count of aggravated bank robbery and of one count of using firearms to commit the crime. Each was sentenced to 25 years' imprisonment for the robbery and 10 years' imprisonment for the firearms count, the sentences to run consecutively to each other and to the sentences previously imposed (App. 27-28). The court of appeals affirmed in a consolidated appeal (App. 29-30).

On September 8, 1975, petitioners robbed at gunpoint the East End Branch of the Commercial Bank of Middlesboro, Kentucky, taking approximately $40,000. Less than two months later, on November 4, 1975, petitioners returned to Middlesboro, where they robbed the West End Branch of the Commercial Bank. This robbery was also accomplished at gunpoint, and again about $40,000 in bank funds was taken (App. 21-22).

To accomplish their escape after the second robbery, petitioners stole the bank manager's automobile after locking the bank personnel in the vault. A police roadblock was set up outside of town, and,

after an exchange of gunfire, petitioners were taken into custody (App. 13).

At sentencing following each conviction, counsel for petitioners argued that the aggravated robbery conviction merged with the firearms offense for purposes of sentencing, thereby precluding cumulative punishment for the two crimes (App. 8-10, 17). The trial court disagreed, ruling that Section 924(c) creates a separate offense for which "the statutes and the legislative history indicate[ ] an intention to impose an additional punishment" (App. 17). Applying the same reasoning, the court of appeals affirmed petitioners' convictions and sentences (App. 29-30). Because of an apparent conflict between the decision below and the decision of the Eighth Circuit in *United States* v. *Eagle*, 539 F.2d 1166, the United States did not oppose the petitions for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principal question in this case is one of congressional intent: whether Congress intended that a defendant convicted and sentenced for assault or endangering life with a deadly weapon during a bank robbery (18 U.S.C. 2113(d)) may also be convicted and sentenced for using a firearm in the commission of that bank robbery (18 U.S.C. 924(c)). As petitioners apparently recognize, there is no real issue under the Double Jeopardy Clause because the two offenses are sufficiently different to meet the standard laid down in *Blockburger* v. *United States*, 284 U.S. 299, 304: "whether each [statutory] provision requires proof of a fact which the other does not."

That test is satisfied here, because under Section 924 (c)(1) the prosecution must prove that the defendant used a firearm to commit a federal felony but need not show that the defendant assaulted anyone or placed anyone's life in danger, whereas under Section 2113(d) the prosecution must prove that the defendant, while committing bank robbery or larceny, either assaulted or endangered the life of another person "by the use of a dangerous weapon or device" but need not show that the weapon or device was a firearm.

The case, therefore, turns on the language and legislative history of Section 924(c). The text of Section 924(c) plainly states that it is to apply to use of a gun to commit "any felony for which [the defendant] may be prosecuted in a court of the United States" and that punishment under that section shall be "in addition to the punishment provided for the commission of such felony." Section 924(c) also sets forth comprehensive penalties, including special provisions regarding multiple offenses, minimum sentences, suspended or probationary sentences, and (after amendment) concurrent sentences, which are substantially more far-reaching and specific than the penalty provisions of Section 2113(d) and comparable statutes.

The legislative history reveals a commitment by Congress to combat with strong measures the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." During the House floor debates on Section 924(c), several legislators (including sponsoring Congressman Poff) indicated that the provision would encompass all felonies punishable in federal court and stressed the need for tough sentencing laws that would deter potential felons from carrying a firearm during their crimes. One Congressman specifically addressed the distinction between firearms and other dangerous weapons, noting that "use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons effective only at a very short range." Moreover, a Senate bill, designed as a counterpart to the already-approved House bill, made clear that it should apply to all federal felonies, including those already penalizing assaults with a dangerous weapon.

We believe that the terms of Section 924(c) and its overall legislative history evidence a congressional intent at variance with the statement of Congressman Poff that it "was not intended to apply to title 18 * * * sections 2113 or 2114 concerning armed robberies of the mail or banks * * *." Neither the Act nor its legislative history suggests that this view, not committed to writing and offered in passing during a floor debate largely concerned with other matters, was understood by or commended itself to a majority of the voting House members, much less to a majority of the Senate members that voted on the final bill. Under these circumstances, and in view of the awkward consequences of Congressman Poff's construction, we submit that this statement should not be accorded conclusive weight.

ARGUMENT

I. THE IMPOSITION OF CUMULATIVE PENALTIES FOR USE OF A FIREARM TO COMMIT A FELONY AND AGGRAVATED BANK ROBBERY DOES NOT OFFEND THE DOUBLE JEOPARDY CLAUSE

For present purposes, we may assume that the Double Jeopardy Clause forbids the imposition of cumulative penalties when a person is convicted of two crimes, one of which is a lesser included offense of the other. See *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977, slip op. 4-5; *Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, slip op. 17; *North Carolina* v. *Pearce*, 395 U.S. 711, 717. On the other hand, it is settled that there is no *constitutional* inhibition to multiple sentences if the offenses are sufficiently distinguishable to meet the test laid down in *Blockburger* v. *United States*, 284 U.S. 299. *Brown* v. *Ohio*, *supra*, slip op. 5; *Iannelli* v. *United States*, 420 U.S. 770, 782; *Gore* v. *United States*, 357 U.S. 386, 392-393. The question, then, is simply one of congressional intent. *Jeffers* v. *United States*, *supra*. Accordingly, we consider first whether the crimes defined in Sections 2113(d) and 924(c)(1) are "separate" offenses for double jeopardy purposes.

As we have just noted, the standard set forth in *Blockburger*, *supra*, has long been recognized as "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment" (*Brown* v. *Ohio*, *supra*, slip op. 5). Although some exceptions (not relevant here) have been noted (see *Brown* v. *Ohio*, *supra*, slip op. 5-6, n. 6), "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not" (*Blockburger* v. *United States*, *supra*, 284 U.S. at 304). As "[t]his test emphasizes the elements of the two crimes" (*Brown* v. *Ohio*, *supra*, slip op. 5), it is not significant that proof of the several crimes in some cases may be coincidental. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes" (*Iannelli* v. *United States*, 420 U.S. 770, 785, n. 17).

The *Blockburger* test is plainly satisfied in the present case. Under Section 924(c)(1) the prosecution must prove that the defendant used a firearm to commit a federal felony but need not show that the defendant committed an assault or placed any life in danger. Nor must the prosecution prove that the felony committed was a bank robbery, aggravated or not. Under Section 2113(d), the prosecution must prove not only that the defendant committed bank robbery or larceny but that in the process he either assaulted another person or endangered the life of another person "by the use of a dangerous weapon or device." It need not show that the dangerous weapon or device was a firearm but may meet its burden by showing that the defendant used a knife, lead pipe, or other weapon effective only at a limited

range. Moreover, some courts of appeals have required a showing that the weapon was in fact immediately capable of inflicting harm, a further requirement inapplicable to use of a firearm under Section 924(c). See, *e.g.*, *United States* v. *Thomas*, 521 F.2d 76 (C.A. 8); *United States* v. *Marshall*, 427 F.2d 434 (C.A. 2). Contra, *United States* v. *Beasley*, 438 F.2d 1279 (C.A. 6), certiorari denied, 404 U.S. 866.

It is thus apparent that a defendant can be convicted under either Section 924(c) or Section 2113(d) yet acquitted under the other. For example, a defendant who employs a dangerous weapon other than a firearm faces liability only under Section 2113(d) and is not subject to the minimum sentence provisions and other restrictions of Section 924(c). Likewise, a defendant who uses a firearm to commit larceny in an unoccupied bank under Section 2113(b) is not subject to the assault or endangerment provisions of Section 2113(d). Nor would there be a conviction under Section 2113(d) for carrying an unloaded firearm in those circuits holding that a present ability to inflict serious harm is necessary under that Section; by contrast the definition of a firearm for purposes of Section 924(c) includes an unloaded weapon. 18 U.S.C. 921(a)(3).

Satisfying the *Blockburger* test ends any constitutional challenge to the convictions and sentences in these cases. Indeed, it goes further: the *Blockburger* test "serves a * * * function of identifying congressional intent to impose separate sanctions for multiple

offenses arising in the course of a single act or transaction." *Iannelli* v. *United States*, *supra*, 420 U.S. at 785, n. 17. Nevertheless, there remains at least a possibility that Congress, although constitutionally free to impose additional penalties for violation of 18 U.S.C. 924(c) in a case like the present one, has otherwise disclosed its intention not to do so. We therefore turn to that question.

II. THE IMPOSITION OF CUMULATIVE PENALTIES FOR USE OF A FIREARM TO COMMIT A FELONY AND AGGRAVATED BANK ROBBERY IS CONSISTENT WITH THE CONGRESSIONAL INTENT

A. Section 924(c) by its terms punishes the use or possession of a firearm during the commission of any federal felony and contains specific and comprehensive penalty provisions for that offense.

From *United States* v. *Wiltberger*, 5 Wheat. 76 (1820), through *Scarborough* v. *United States*, No. 75-1344, decided June 6, 1977, slip op. 6, this Court has recognized that the primary guide to the meaning of a statute is its text. This settled rule of construction depends not on any rigid notion that other available aids to interpretation are inconsequential (see *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10) but on the common-sense idea that Congress best indicates what it means by what it says. Where "there is no ambiguity in the words [of the statute], * * * there is no justification for indulging in uneasy statutory construction" (*Barrett* v. *United States*, 423 U.S. 212, 217).

Section 924(c) on its face contains little hint of ambiguity. It states plainly that it applies to anyone who "uses a firearm to commit *any felony* for which he may be prosecuted in a court of the United States" and directs without equivocation that such a person "shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years."[1] A felony for such purposes is defined by 18 U.S.C. 1(1) as "[a]ny offense punishable by death or imprisonment for a term exceeding one year," a definition that clearly includes bank robbery and aggravated bank robbery in violation of 18 U.S.C. 2113(a) and (d). Thus, the statute by its terms would seem to provide an additional penalty for commission of a federal felony with a firearm, whether or not a separate provision increased the penalty for use of a firearm or other dangerous weapon.

This construction is reinforced by the fact that Section 924(c) provides penalties qualitatively (as well as quantitatively) different from the penalties incorporated in the aggravated bank robbery statute or similar laws dealing with "dangerous weapons." Far from merely providing for longer terms of incarceration, Section 924(c) establishes mandatory minimum sentences, imposes increasingly severe sentences on recidivists (without possibility of suspension or probation), and prohibits concurrent sentenc-

[1] More severe sanctions are imposed upon a second or subsequent offender, who faces a sentence of at least two and as many as 25 years' imprisonment.

ing. Thus, a first offender under Section 924(c) must receive at least a one-year consecutive sentence, while a second-time offender must serve (without suspension or probation) a minimum two-year consecutive sentence and may receive (without suspension or probation) a consecutive 25 year sentence. As we later discuss (see pp. 16-25, *infra*), these comprehensive penalties reflect Congress' determination to curb the particularly lethal risks created by the use, not just of any dangerous weapon, but specifically of a gun.

By contrast, Section 2113(d) does not prescribe mandatory minimum sentences, nor does it prohibit concurrent sentences or probation. Moreover, the maximum sentence of 25 years' imprisonment under Section 2113(d) is only five years greater than the maximum sentence for simple bank robbery under Section 2113(a),[2] though it is 15 years more than the maximum for larceny under Section 2113(b) and 24 years longer than the maximum for petit larceny under Section 2113(b). Were petitioners' reading of congressional intent correct, therefore, a bank robber armed with a gun would be subject at most to an additional five years' imprisonment for his first offense (with no mandatory minimum sentence), while all other felons so armed would be exposed to an additional sentence of at least one, and possibly 10 years. If the gun-wielding bank robber were a recidivist, he

[2] A maximum fine of $5,000 under Section 2113(a) is increased to $10,000 under Section 2113(d).

would remain exposed to only five additional years of imprisonment (with no mandatory minimum) under Section 2113(d), with the possibility of probation or a concurrent sentence, whereas all other persons twice convicted of using a firearm to commit a felony would face an additional consecutive sentence of at least two and possibly 25 years' imprisonment without suspension or probation under Section 924(c). In light of these differences, it is unlikely that Congress intended punishment under Section 2113(d) for bank robbers to preempt the important sentencing provisions of Section 924(c).

It can be argued, of course, that Congress expected prosecutors, as a means of avoiding this curious result, to prosecute armed bank robberies and larcenies under Section 2113(a) or (b) and Section 924(c) alone, abandoning the provisions of Section 2113(d). But, whatever sense this argument might make in the context of bank robberies under Section 2113(a), it leads to equally curious results under Section 2113(b). Because Section 2113(d) permits a greater sentence for armed offenses under Section 2113(b) than would Section 924(c), a person using a knife to commit larceny in a bank would face 25 years' imprisonment, while his counterpart with a gun would face only 20 years as a first offender. Were the value of the stolen property less than $100, the 25-year maximum under Section 2113(d) would stand in contrast to an 11-year maximum for a first offender under Sections 2113(b) and 924(c). In view of these peculiar consequences,

it seems far more reasonable to read Section 924(c), as it is written, to provide not alternative penalties but penalties "in addition to the punishment provided for the commission of [the underlying] felony."

We further note that, had Congress in fact desired to create an exception of the sort that petitioners desire, it had a convenient opportunity to do so in the drafting of Section 925 of the Gun Control Act of 1968, entitled "Exceptions; Relief from disabilities." In that Section Congress explicitly stated that "[t]he provisions of this chapter shall not apply with respect to" a list of carefully defined acts that otherwise would have been unlawful.[3] Yet nowhere in that Section is there an indication that the applicability of Section 924(c) was limited to certain federal felonies. In view of that silence, it is inappropriate for the courts to permeate a statute with major exceptions that Congress could have adopted but never did. See *Yates* v. *United States*, 354 U.S. 298, 305; *United States* v. *Bass*, 404 U.S. 336, 339; *Huddleston* v. *United States*, 415 U.S. 814, 831.

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[3] In sum, Section 925 excludes from the provisions of the Act the transportation or importation of firearms and ammunition which are furnished to the United States or to any state or political subdivision or sold, issued, or shipped by the Secretary of the Army in support of enumerated military and civilian training activities.

B. The legislative history of the Gun Control Act supports the unambiguous language of Section 924(c).

The legislative history of Section 924(c), while hardly extensive, is generally consistent with the belief that Congress intended to step up the punishment of federal felonies committed with firearms. Although one statement by Congressman Poff puts forth a contrary view, we do not regard it as of sufficient weight to override the language of the statute and other strong indicia of congressional intent.

The Gun Control Act of 1968 (Pub. L. 90-618, 82 Stat. 1213), of which Section 924(c) became a part, was enacted largely in response to a single concern: the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime" (H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968)). The worsening crime situation in recent years had aroused considerable attention and alarm in Congress. During 1967, Congress held extensive hearings on crime control legislation, including proposed gun control bills, in which frequent references were made to the fact that firearms were used in approximately 5,600 murders, 34,700 aggravated assaults, and the vast majority of 68,400 armed robberies during 1965 and that guns killed all but 10 of the 278 law enforcement officers murdered in the preceding five years.[4]

[4] These figures were set forth in the Report by the President's Commission on Law Enforcement and Administration of Justice, published in February 1967, as *The Challenge Of Crime In A Free Society*, p. 239. See Hearings on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386 before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess. 213, 242, 261 (1967) The Crime Commission's Report was also considered by the Senate Judiciary Committee in connection with the legislation eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968. S. Rep. No. 1097, 90th Cong., 2d Sess. 31 (1968). The Committee Report on that bill cited further statistics on the use of firearms in the commission of serious crimes, indicating significant increases in 1966 and 1967 over the 1965 figures reflected in the Crime Commission Report (*id.* at 76).

More recent and even more troubling statistics on the use of firearms in violent crime were cited in Attorney General Clark's letter to Congress requesting adoption of the Gun Control Act (H.R. Rep. No. 1577, *supra*, at 18-20) and in the Senate and House Judiciary Committee Reports on the Act (*id.* at 7-8; S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)).

Congress confronted the danger revealed by these figures with a two-pronged approach. First, it expanded federal control over the sale and shipment of firearms across state lines by prohibiting gun sales to out-of-state purchasers and to minors and by forbidding their purchase through interstate mail orders. See 18 U.S.C. 922. Second, it attacked the crime problem directly by punishing the use of firearms in the commission of serious crimes. Section 924(c), introduced and adopted on July 19, 1968,[5] was addressed to the second objective.

[5] Because the statute was introduced and approved on the same day, there are no legislative hearings and no committee reports concerning it; the pertinent legislative history is contained in a few pages of the Congressional Record and consists primarily of the views of supporters of the House bill and its Senate counterpart.

The language which became Section 924(c) was offered by Congressman Poff as a substitute for a floor amendment made by Congressman Casey to the House version of the Gun Control Act.[6] That amendment had provided stiff minimum penalties for anyone who, "during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce" (114 Cong. Rec. 22229 (1968)).[7] Supporters of the Poff substitute noted that the Casey language applied to the use or possession of firearms in state as well as federal felonies, and would thereby convert thousands of state offenses into federal violations. This result was criticized both as an intrusion upon state jurisdiction and as the progenitor of an unmanageable load of criminal cases in the federal system. See *id.* at 22232-22235. Other Congressmen felt that the provision violated principles of due process and equal protection

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[6] Some minor changes concerning the penalty provisions of the Poff proposal were adopted later. See note 9, *infra*.

[7] The text of the amendment provided:

> That whoever during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce shall be imprisoned—
>
> (1) in the case of his first offense, for not less than ten years;
>
> (2) in the case of his second or more offense, for not less than twenty-five years.

or that the burden of proving the jurisdictional nexus unacceptably weakened the amendment. *Id.* at 22231 (remarks of Congressman Poff); *id.* at 22233 (remarks of Congressman Cramer).

The substitute bill presented by Congressman Poff was intended to cure the perceived defects in the Casey proposal by making it a separate federal offense to use or unlawfully carry a firearm during the commission of "any felony which may be prosecuted in a court of the United States" (*id.* at 22231). In introducing his proposal, Congressman Poff made clear his intention to strengthen, not weaken, the Casey language:

> [M]y amendment is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment. Rather, it retains its central thrust and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment. [*Ibid.*]

In particular, the Poff substitute provided for escalating mandatory minimum sentences, without the possibility of concurrent sentencing, and encompassed all federal felonies, not merely those felonies enumerated in the Casey proposal.

Despite the broad language, however, Congressman Poff made an additional statement that provides virtually the entire basis for petitioners' argument in this case. After noting that his amendment did not pertain to state offenses, Congressman Poff further stated:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply

> to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies. [114 Cong. Rec. 22232 (1968).]

No response or other comment was directed at this remark, and the debate reverted immediately to the issue of excluding state crimes.

As petitioners apparently believe that the statements made by Congressman Poff should be given conclusive effect, and treated as though they were included in the text of the statute, it is essential to determine the appropriate degree of weight that they should be accorded. Although the words "any felony" appear at first sight sufficiently clear to justify an acceptance of their plain meaning, without giving any weight whatever to Congressman Poff's statement, we acknowledge that even when the statute is unambiguous, such indicia of legislative intent need not be dismissed out of hand. This Court has recently observed that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (*Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10). Nonetheless, when the legislative materials are as sparse as they are in this case, it seems appropriate also to remember that "statements [made on the House floor], even when they stand alone, have never

been regarded as sufficiently compelling to justify deviation from the plain language of a statute" (*United States* v. *Oregon*, 366 U.S. 643, 648). As Justice Jackson once observed: "[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions" (*Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 396 (concurring opinion)). That observation is particularly pertinent where, as here, the statement relied upon was made in only one of the two Houses of Congress and is contrary to both the language of the statute and the principal thrust of its legislative history.

Nothing else in the legislative history of Section 924(c) reinforces the proposition that the statute applies to certain, but not all, federal felonies. Indeed, Congressman Poff, when later asked to compare the coverage of his amendment to the Casey amendment, flatly stated: "My amendment would apply to all Federal felonies including heinous crimes in all grades, down to the lowest level of a felony" (114 Cong. Rec. 22233 (1968)). Moreover, the plain concern of House members was to impose additional deterrence on the use of firearms—"to persuade the man who is tempted to commit a Federal felony to leave his gun at home" (*id.* at 22231; remarks of Congressman Poff)—rather than to treat firearms and other dangerous weapons in the same manner. Thus, Congressman Horton stated:

> Even where the crime does not result in death or injury, the use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons effective only at a very short range. The 'equalizer' as it has been called, is a tool of terror, death, and injury in the hands of a criminal. He who stoops to point its barrel at an innocent victim * * * deserves to be singled out by the laws as the worse kind of social menace. [*Id.* at 22247.]

Whatever Congressman Poff's view may have been, therefore, there is no evidence that it was shared by his colleagues voting on the amendment.

Subsequent events also suggest that Congressman Poff's remarks did not reflect a common understanding of the coverage of Section 924(c). Approximately two months later, while the Gun Control Act remained pending, Senator Dominick introduced an amendment to the Senate version of the Gun Control Act that provided a sentence of up to life imprisonment for any person armed with a firearm while committing certain enumerated federal crimes. The list of crimes, included, *inter alia*, robbery and "any * * * assault with a dangerout [sic] weapon" (114

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[8] The text of the Dominick proposal was, in pertinent part, as follows:

> § 2401. Use of firearms in the commission of certain crimes of violence
>
> Whoever, while engaged in the commission of any offense which is a crime of violence punishable under this title, is armed with any firearm, may in addition to the punishment provided for the crime be punished by imprisonment for an indeterminate number of years up to life, as determined by the court. Upon a subsequent conviction under this section by the same person, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.
>
> § 2402. Definitions
>
> As used in this chapter—
>
> "Crime of violence" means any of the following crimes or an attempt to commit any of the following crimes: murder; voluntary manslaughter; Presidential assassination, kidnaping, and assault; killing certain officers and employees of the United States; rape; kidnaping; assault with intent to kill, rob, rape, or poison; assault with a dangerout [sic] weapon, robbery; burglary; theft; racketeering; extortion; and arson.

Cong. Rec. 27142 (1968)).[8] Senator Dominick took express notice that several federal statutes, including Section 2113(d), already provided greater penalties for use of a "dangerous or deadly weapon" and then declared (*id.* at 27143):

> My amendment would not repeal these provisions nor would it diminish their effectiveness. While the terminology varies, in general it may be said that each of these sections covers any dangerous or deadly weapon. On the other hand, my amendment covers only firearms. As such, it is not intended to detract from these existing sections, but it would be available, if the prosecutor and the court desired, for the purpose of stronger penalties in those cases where firearms were involved.

Senator Murphy, who co-sponsored the Dominick amendment, recognized that it was designed as a counterpart of the House version already adopted. Although strongly supporting the Senate measure,

he noted that the House language made additional penalties for use of a firearm mandatory and that it applied to "any felony, as defined by this act." *Id.* at 27144. The Dominick amendment then passed the Senate after brief discussion and without any apparent opposition, but was replaced in the final version of the Gun Control Act by the Poff amendment, its apparent counterpart in the House.[9] Again, there is no evidence that the views reflected in the statement of Congressman Poff on the floor of the House had commended themselves to the other Congressmen or Senators acting on the bill.

In short, the legislative history of Section 924(c), even according due regard to the remarks of Congressman Poff, is not adequate to override the stat-

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[9] After the Dominick amendment passed, the Senate voted to amend the House bill, H.R. 17735, by deleting all of the House language following the enacting clause and substituting the text of the Senate bill, S. 3633, as amended. A conference committee subsequently adopted the House version of Section 924(c), except that the prohibitions on suspended sentences and probation were made applicable only to second and subsequent convictions and restrictions on concurrent sentencing were eliminated. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). The bill was signed by the President on October 22, 1968.

Title II of the Omnibus Crime Control Act of 1970 (Pub. L. 91-644, 84 Stat. 1889) amended Section 924(c) by reimposing the restriction that no sentence of imprisonment thereunder could be served concurrently with any term imposed for the underlying felony. The amendment also reduced the minimum mandatory sentence of imprisonment for repeat offenders from five to two years.

ute's clear language and purpose.[10] Congress was well aware that firearms, which can often be concealed, can discharge rapidly and repeatedly over great distances, and can use explosive substances, have a lethal potential that other dangerous weapons do not possess. Therefore, while Congress had already punished the use of "dangerous weapons" in committing some crimes (including bank robbery), it had ample reason to declare that any felon armed with a firearm would face yet additional punishment. We believe that it did so in Section 924(c).

C. The decisions of other courts of appeals recognize that Congress intended to apply Section 924(c) to all federal felonies.

Every court of appeals that has addressed the specific issue has agreed with the court below that Congress intended Section 924(c) to supplement the sanctions for bank robbery with a "dangerous weapon or device." See *United States* v. *Grant*, 549 F. 2d

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[10] Since the intent of Congress is sufficiently clear, there is no occasion for the Court to apply the rule of lenity. Compare *Rewis* v. *United States*, 401 U.S. 808, 812; *United States* v. *Bass*, *supra*, 404 U.S. at 347. That principle is applicable only when there is "uncertain[ty] about the statute's meaning." *Scarborough* v. *United States*, *supra*, slip op. 14; *United States* v. *Bramblett*, 348 U.S. 503, 510. Here, the wording of Section 924(c), its structure and its legislative history demonstrate with sufficient clarity that Congress intended to restrict the use of firearms to commit "any felony." Although penal laws are to be strictly construed, they "ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Company* v. *United States*, 2 Pet. 358, 367; *United States* v. *Bass*, *supra*, 404 U.S. at 351; *Huddleston* v. *United States*, *supra*, 415 U.S. at 831.

942, 948 (C.A. 4), certiorari denied, June 20, 1977, No. 76-6463, petition for writ of certiorari pending *sub nom. Whitehead* v. *United States*, No. 76-6258; *United States* v. *Crew*, 538 F.2d 575 (C.A. 4), certiorari denied *sub nom. Jones* v. *United States*, 429 U.S. 852; *Perkins* v. *United States*, 526 F.2d 688 (C.A. 5). See also *United States* v. *Ramirez*, 482 F.2d 807 (C.A. 2), certiorari denied *sub nom. Gomez* v. *United States*, 414 U.S. 1070; *United States* v. *Sudduth*, 457 F.2d 1198 (C.A. 10).[11] Although the various courts of appeals did not discuss the remarks of Congressman Poff, those decisions demonstrate at the least that, aside from those remarks, there is little reason to infer a congressional intent to limit punishment under Section 924(c) only to certain crimes. As the Fourth Circuit stated in *United States* v. *Crew*, *supra*, 538 F.2d at 577-578:

> [A]ppellants would have use equate "using a dangerous weapon or device" with "used or carried a firearm" * * *. However, it is clear that Congress never intended to equate these terms.
>
> The passage of Section 924(c) was a Congressional reaction to demands for "gun control" in the wake of political assassinations. It is a narrowly drawn statute intending to discourage a felon from using or carrying a firearm, and does not encompass the use of nonexplosive weapons. On the other hand, Section 2113(d) punishes a felon for the use of any weapon or device during the course of a bank robbery which jeopardized the lives of others. Therefore, the offenses are not identical in law and fact, and the separate sentences under Sections 2113(d) and 924(c) are [appropriate].

These decisions correctly emphasize the legislative policy to provide increased deterrence to the use of firearms in federal felonies. As the courts of appeals have noted, that intention is manifest in the legislative history of Section 924(c) and finds clear expression in the language of the statute itself. We believe, therefore, that the court of appeals in this case correctly concluded that petitioners were subject to cumulative punishment under Section 2113(d) and Section 924(c).

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[11] One court of appeals has taken a conflicting view. In *United States* v. *Eagle*, 539 F.2d 1166, the Eighth Circuit reversed the conviction under Section 924(c) of an Indian defendant convicted at the same trial for assault "with a dangerous weapon" in violation of the Major Crimes Act, 18 U.S.C. 1153. Based solely on the remark of Congressman Poff heretofore discussed, the court concluded that "the legislative history" of Section 924(c)(1) undercut its application in such a case "because § 1153 itself provides an increased penalty for use of a dangerous weapon" (539 F.2d at 1171). The court stated that it was "not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute * * * and [this] apparently was not intended by Congress" (*id.* at 1172). For the reasons set forth above, we believe that conclusion to be incorrect.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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* The Solicitor General is disqualified in this case.

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